

UTAH RADIATION CONTROL BOARD

**MINUTES OF THE UTAH RADIATION CONTROL BOARD MEETING, March 1, 2002,
Department of Environmental Quality (Bldg #2), 168 North 1950 West, Conf. Room 101,
Salt Lake City, Utah.**

BOARD MEMBERS PRESENT

Stephen T. Nelson, Ph.D., Chairman
Gary L. Edwards, M.S., Vice Chairman
William J. Sinclair, M.S.E.H., Executive Secretary
Kent J. Bradford, P.G.
Thomas K. Chism, M.S.
Teryl J. Hunsaker, Commissioner
Rod O. Julander, Ph.D.
Karen S. Langley, M.S.
Dianne R. Nielson, Ph.D.
Gregory G. Oman, D.D.S., B.S.
Barbara S. Reid, M.D.

BOARD MEMBERS ABSENT/EXCUSED

Cathleen C. Gilbert, C.P.A., Esq

DRC STAFF/OTHER DEQ MEMBERS PRESENT

Dane Finerfrock
Laura Lockhart, Attorney General's Office
Chris Morley, Attorney General's Office
Loren Morton
Fred Nelson, Attorney General's Office
Yoli Shropshire

PUBLIC

Kenneth L. Alkema, Envirocare of Utah, Inc.
Claire Geddes, Utah Legislative Watch
Jason Groenewold, FAIR
Jim Holtkamp, LeBoeuf, Lamb, Greene
& MaCrae LLP
John Jensen, FAIR
Charles Johnson, Utah Legislative Watch
Cindy King, Utah Chapter of the Sierra Club
Mark Ledoux, Envirocare of Utah, Inc.
Michelle Rehmann, IUC (USA)
Patrick Thomas, Adamson and Associates

GREETINGS/MEETING CALLED TO ORDER

The Utah Radiation Control Board convened in the DEQ Building #2, Room 101, 168 North 1950 West, in Salt Lake City, Utah. The meeting was called to order at 1:00 p.m. by Dr. Stephen T. Nelson, Chairman of the Board. Dr. Nelson welcomed all members and public attending the meeting. Dr. Nelson stated to those present, if they wished to address any items on the agenda to indicate it on the sheet as they signed in. Those desiring to comment would be given a chance to address their concerns on any agenda items to the Board.

I. APPROVAL OF MINUTES

a. Approval of January 4, 2002 Minutes (Board action item)

Barbara Reid indicated that she found there were several errors in the way the minutes were transcribed by the court reporter. She felt that there was not enough time to try to correct them in this meeting. Dr. Reid said that there were so many errors in the way people spoke regarding their grammar that she would rather not waste the time to correct them.

Fred Nelson said that there was not anything that should be done in regards to what was actually stated, as this is the way it is transcribed by a court reporter. He indicated that, on the other hand, if Dr. Reid felt there was a mistake in the transcription, she could register a request for a correction to the minutes. It could then be attached to the minutes. Fred indicated that, where there is a grammar issue during the meeting, that a correction is not possible if it is transcribed verbatim by a court reporter.

Dianne Nielson asked Fred if it was appropriate to ask that individuals, whose comments were captured in the transcript incorrectly, make corrections to the minutes then submit them to the Executive Secretary. The corrections would be attached to the minutes, but there would be no changes or corrections made to the original minutes. The corrections would then be available to whomever would like to see the minutes and they would have a better understanding with such clarification to the minutes. (Fred Nelson concurred this was appropriate.)

Rod Julander made a motion to approve the minutes of January 4, 2002, seconded by Teryl Hunsaker.

CARRIED AND APPROVED UNANIMOUSLY

II. RULES

No items

III. RADIOACTIVE MATERIALS LICENSING/INSPECTION

No items

IV. X-RAY REGISTRATION/INSPECTION

No items

V. RADIOACTIVE WASTE DISPOSAL

Items a, b, and c were transcribed by a court reporter. The transcript is provided as Attachment A.

a. Joint Motion and Order for Partial Stay of Proceedings - presentation by Laura Lockhart, Utah Attorney General's Office (Board action item)

Joint Motion and Order for Partial Stay of Proceedings was approved unanimously. See pages 4-6 of Attachment A.

b. Determination on Envirocare's Motion for Summary Judgement - presentation by Fred Nelson, Utah Attorney General's Office (Board action item)

A motion on the process to consider Envirocare's motion for summary judgement was approved unanimously. See pages 35-36 of Attachment A.

(1) Summary judgement issue I - Unreasonable risk to health and safety of the public (see pages 36-60). Summary judgement granted by a vote of 9-1 (pages 59-60).

(2) Summary judgement issue II - Emergency response coordination and off-site response planning and transportation routing (see pages 60-69). Summary judgement denied by a vote of 6-4 (see pages 69-70).

(3) Summary judgement issue III - Proper procedures were followed in granting the land ownership exemption (see pages 71-82). Summary judgement granted by a vote of 9-1 (see pages 82-83).

(4) Summary judgement issue IV - Whether the land ownership exemption for Class A waste can be properly applied to Class B and C waste disposal (see pages 84-86). Summary judgement granted by a vote of 10-0 (see pages 86-87).

(5) Summary judgement issue V - Whether it was improper to issue the license without having the site access permit program in place (see pages 88-90). Summary judgement granted by a vote of 10-0 (see pages 86-87).

(6) Summary judgement issue VI - Whether future site ownership was dealt with properly prior to issuance of the license (see pages 91-96). Summary judgement granted by a vote of 9-1 (pages 96-97).

(7) Summary judgement issue VII - Whether the license contains improper conditions or was improperly issued (see pages 97-108). Summary judgement granted by a vote of 8-2 (see page 108).

(8) Summary judgement issue VIII - Whether the licensing decision violates Compact law (see pages 109-115). Summary judgement granted by a vote of 10-0 (see pages 115-116).

(9) Summary judgement issue IX - Whether there was improper bias and prejudice on the part of the Board (see pages 116-120). Summary judgement granted by a vote of 10-0 (see pages 120-121).

c. Determination of petitioner's intervention requests regarding appeals of final Executive Secretary decision on Envirocare's modification request to accept containerized Class A waste in the existing cell of November 19, 2001 - presentation by Fred Nelson, Utah Attorney General's Office (Board action item)

The Board granted FAIR until March 15, 2002 to file any additional pleadings if it was believed that issues within the intervention petition were not dealt with in the motion for summary judgement. Envirocare was given until March 25, 2002 to respond to any such pleading. This motion was carried unanimously (see page 128 of Attachment A).

Determination of petitioner's intervention requests regarding appeals of final Executive Secretary decision on Envirocare's modification request to accept containerized Class A waste in the existing cell of November 19, 2001 was discussed (see pages 129-137). FAIR was denied intervention by a vote of 10-0 (see pages 137-138).

d. Determination regarding written findings on petitioner's intervention requests regarding appeals of final Executive Secretary decision on Envirocare's application to accept containerized Class A, B, and C low-level radioactive waste of July 9, 2001 and motion to disqualify - presentation by Fred Nelson, Utah Attorney General's Office (Board action item)

Fred Nelson discussed the written findings provided to the Board in draft regarding the Board's decision to grant intervention to FAIR, Utah Legislative Watch, and Citizens Against Radioactive Waste in the appeals of the final Executive Secretary decision on Envirocare's application to accept containerized Class A, B, and C low-level radioactive waste of July 9, 2001 and the motion to disqualify which were action items at the January 7, 2002 Board meeting. He discussed changes suggested to the draft document and advised the Board he was supportive of the changes.

Stephen Nelson made the motion to accept the written findings as amended.

CARRIED AND APPROVED UNANIMOUSLY

e. Summary of Northwest Interstate Compact Meeting of February 21, 2002, Portland, Oregon (Board information item)

Bill Sinclair reported on the Northwest Interstate Compact meeting held recently in Portland, Oregon. An agenda was provided in the Board packet. There were several items that were discussed including the typical business at the Compact meeting dealing with the U.S. Ecology site in Washington and the Envirocare site in Utah. One issue of importance to Utah that was discussed was the three-year review of the second amended resolution and order. This order is an arrangement between the Northwest Compact and Envirocare which allows the Envirocare facility to receive low-level waste from states outside of the Northwest Compact and mixed waste from any state.

There was significant public comment on the three-year review of the Order including two commentors from Utah. Kent Bradford, representing Western Zirconium and Utah generators, requested that the Committee modify the current order to state:

“States affiliated with the Northwest Compact that have been sited and permitted a low-level waste disposal facility within their state may approve wastes generated in that state for disposal at that in-state without Compact approval.” This amendment would allow Utah generators to access the Envirocare site. Currently, low-level waste generated in Utah goes to the U.S. Ecology site in Washington.

Mr. Bern Haggarty, representing FAIR was interested in making sure that the Order was clear as to the extent of what was acceptable for disposal. Currently, the Order states that “the radioactive material license of Envirocare of Utah,” as determined by the State of Utah, is allowed access. . .” Mr. Haggarty pointed out several other areas that he believed could be better defined in the current Resolution and Order.

There was also significant comment from U.S. Ecology and their supporters regarding ideas that might change the current Resolution and Order. The Compact Committee appointed a subcommittee of Bill Sinclair, Utah; Mike Garner, Compact Executive Director from the State of Washington; David Stewart-Smith of Oregon, Kathleen Trevor of Idaho, and Doug Dasher of Alaska to review any needed changes to the Order and report back to the Committee at the next meeting on June 5, 2002, in Seattle.

VI. URANIUM MILL TAILINGS UPDATE

a. Moab Millsite Update (Board information items)

- 1. Summary of visit of the National Academy of Sciences, January 14 - 15, 2002 to Moab**
- 2. Dissolution to the Moab Millsite Trust**
- 3. Atlas Stakeholder’s Meeting - March 15, 2002, Moab, Utah**

The above items were presented by Loren Morton, see following outline:

Uranium Mill Tailings Activities: Since 01/04/02

Date	Activity / Description
Moab Millsite Activities	
January 14 & 15, 2002	<p>National Academy of Science (NAS) committee meetings held in Moab, Utah.</p> <ol style="list-style-type: none"> 1. Monday, January 14 – including: <ol style="list-style-type: none"> A. Morning - DOE presentations to NAS Committee regarding previous Title I cleanups, long-term surveillance program, etc. B. Afternoon – site visit to Moab Mill tailings site and vicinity. 2. Tuesday, January 15 – including: <ol style="list-style-type: none"> A. Morning - Dianne Nielson made a short presentation to the NAS Committee, followed by 2 panel discussions on: <ol style="list-style-type: none"> 1) Groundwater (Loren Morton participated), and 2) Ecological and Human Health Risk B. Afternoon – 3 panel discussions were made before the NAC Committee on: <ol style="list-style-type: none"> 1) Cost Estimates 2) Regulatory Issues (Loren Morton participated), and 3) Perspectives on Tailings Management C. Evening – public meeting <p><u>Anticipated Schedule:</u> NAS will publish its findings during the Summer, 2002. Chairman Kai Lee (Williams College) predicted that the Committee will NOT make a recommendation on which clean-up alternative is best; but instead will discuss pros and cons of each and recommend that policymakers make the decision.</p> <p>DOE staff stated that the Final Remediation Plan will be approved by at least the Assistant Secretary of Energy.</p>
January 14, 2002	<p>PricewaterhouseCoopers (PWC) wires \$300,000 to escrow account held by Utah State Treasurer's Office. PWC retains \$13,000 for preparation of federal taxes for the Trust. Same day the State Treasurer wires \$150,000 of the account to NRC who will return funds back to Federal treasury.</p>
January 15, 2002	<p>95 boxes of Atlas records arrived at DEQ. Later these Atlas records were examined by DEQ staff to select those related to personnel issues. The majority of the remaining records were then returned to DOE-GJO. DEQ Human Resources Division will organize and maintain the Atlas personnel records to support citizen requests related to the Federal Atomic Workers Compensation Act.</p>
Activities upcoming	<ol style="list-style-type: none"> 1. March 4, 2002 – meeting with DOE-GJO to prioritize projects contemplated for State Escrow money. 2. March 15, 2002 – Atlas Stakeholders meeting planned for Moab, Utah. 3. President's Proposed FY2003 Budget – includes \$1.596 Million for Moab tailings.

VII. OTHER DEPARTMENT ISSUES

a. 2002 Utah Legislative Session (Board information item)

Bill Sinclair reported that the legislative session is still on-going and a majority of time has been spent trying to move through SB96 - Uranium Mill Tailings Oversight, the legislation that establishes the statutory authority necessary to assume the uranium mill tailings program. The bill has had two committee hearings with favorable recommendations and passed the Senate. It awaits approval in the House.

VIII. PUBLIC COMMENT

IX OTHER ISSUES:

a. Next Board Meeting - April 5, 2002, Department of Environmental Quality (Bldg #2), Conference Room 101, 168 North 1950 West, Salt Lake City, Utah, 2:00 - 4:00 p.m.

The next Board meeting is scheduled for April 5, 2002, at the DEQ, Building #2, Conference Room 101, at 168 North 1950 West, here in Salt Lake City. The Board meeting is scheduled to start at 2:00 p.m.

The meeting adjourned at 4:40 p.m.

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Utah Department of Environmental Quality
Before the Utah Radiation Control Board
Public Hearing

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Be it remembered that on the 1st day of
March, 2002, a hearing was held in the above-entitled matter
and was taken before Dawn M. Davis, a Certified Shorthand
Reporter and Notary Public in and for the State of Utah,
commencing at the hour of 1:00 p.m. of said day at
168 North 1950 West, Salt Lake City, Utah.

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A P P E A R A N C E S

Representing the Radiation Control Board:

Teryl W. Hunsaker
Rod O. Julander
Thomas K. Chism
Kent J. Bradford
Barbara S. Reid
Dianne R. Nielson
William J. Sinclair
Stephen T. Nelson
Gary L. Edwards
Gregory G. Oman
Karen S. Langley

Representing the Utah Attorney General's Office

Fred Nelson

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P R O C E E D I N G S

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Mr. Fred Nelson: The initial matter on the agenda is the joint motion for partial stay of the proceedings.

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And I don't know whether, Laura, you would like to comment on this one.

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Ms. Lockhart: Sure. Certainly.
As you'll remember, one of the parts of the proceeding against the Envirocare permit was a request for agency action by the Air Force suggesting that there were -- I guess it would be constitutional problems with the -- with the license conditions or, I guess, implementation of the license conditions.

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That is being managed by negotiations between the Department of Defense, generally, and the Compact and it's expected that there will be a resolution to that shortly. Well, shortly in terms of the Federal government. It probably will not be until summer. But it's my hope that the date on this stipulation will be a real one and that when we get to that point we'll have a final resolution in place.

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Mr. Nelson: So --
Mr. Fred Nelson: The request is to then extend the stay that you granted before and it would be

1 extended to July, the timetable would be moved so we would
2 need a motion to extend that.

3 Mr. Nelson: To extend it.

4 Are there any questions?

5 Ms. Lockhart: Or I guess simply to adopt the
6 order.

7 Mr. Nelson: Right, to adopt the order as
8 written.

9 Any questions? Any motions?

10 Mr. Hunsaker: I would move that we adopt
11 the order.

12 Mr. Nelson: It's so moved by Teryl Hunsaker.

13 Do we have a second?

14 Seconded by Karen Langley.

15 Is there any discussion before we -- I don't
16 see any discussion then. Why don't we proceed then -- if
17 there are no objections, let's proceed to a vote. We'll
18 take this by row, one at a time.

19 Karen.

20 Mr. Julander: Excuse me. Before we vote on
21 that may I make a statement?

22 Mr. Nelson: Sure.

23 Mr. Julander: It was brought to my
24 attention, and we had forgotten about it. My wife is on the
25 board of Citizens -- I have forgotten the name of the group.

1 Mr. Fred Nelson: Citizens Against
2 Radioactive Waste in Utah.

3 Mr. Julander: Citizens Against Radioactive
4 Waste in Utah.

5 This is -- this organization has become
6 involved in this overall question we are meeting for and
7 that presents, then, a conflict of interest in my case,
8 which I was told by our attorney that anyone could
9 challenge. Mr. Ken Alkema of Envirocare called. I didn't
10 get a chance to talk to him. He left a message indicating
11 that his group would not challenge my participation on this
12 item, but I thought I ought to make it public so that if
13 anybody else wanted to challenge it. We thought the
14 simplest thing would be for her to resign, and she has been
15 at the legislature from about 7 till 10 and hasn't even had
16 a chance to do that, so that's where we are at this point.
17 If anyone would like to challenge that, we can deal with
18 that now. Otherwise, I will stay as I am.

19 Mr. Nelson: Does that create a problem for
20 anyone? If Dr. Julander chooses to participate, does anyone
21 have an objection to that? Any one of the parties?

22 Apparently not. Okay. Okay.

23 Ms. Langley: I would say aye.

24 Mr. Nelson: Okay.

25 Greg.

1 Mr. Oman: Aye.
2 Mr. Nelson: Cathleen is not here.
3 Aye.
4 Dianne.
5 Ms. Nielson: Aye.
6 Mr. Nelson: Barbara.
7 Ms. Reid: Aye.
8 Mr. Nelson: Kent.
9 Mr. Bradford: Aye.
10 Mr. Nelson: Tom.
11 Mr. Chism: Aye.
12 Mr. Nelson: Rod.
13 Mr. Julander: Aye.
14 Mr. Nelson: And Teryl?
15 Mr. Hunsaker: Aye.
16 Mr. Nelson: Okay. So that is -- the order
17 is adopted. Okay.
18 Mr. Fred Nelson: The next item that is on
19 the agenda is a Motion for Summary Judgment that has been
20 brought to the board by Envirocare.
21 As you'll recall, the stage we are here in
22 the proceedings is, is that the requests have been filed by
23 the now admitted parties. You granted intervention to three
24 groups. That means that they have the opportunity to
25 present issues before the board.

1 I have had questions concerning what a Motion
2 for Summary Judgment is, so I thought I would just briefly
3 identify for you what that is.

4 I do not agree with -- with the interveners,
5 that the Motion for Summary Judgment is not an appropriate
6 process for the board. It is. It's recognized by the State
7 Administrative Procedures Act, it's recognized as part of
8 the normal processes that the courts use. And the reason
9 for that is it's a mechanism to facilitate efficiency in
10 handling the issues and identifying specifically what is
11 being argued and what is not.

12 The civil procedure rule is Rule 53 -- or 56,
13 excuse me. And what it says is that if there are issues
14 where there are no factual disputes, or if there are issues
15 that are simply questions of law, that those issues do not
16 require the taking of evidence. You don't need to put a
17 witness on the stand, you don't need to present a document,
18 because the evidence is already there. You don't need to
19 have testimony presented because there is no conflict in
20 facts. Everybody agrees to the facts.

21 There are also issues which are simply
22 questions of law which don't require the taking of evidence
23 because it's a matter of looking at the rule or the statute
24 or the process and seeing whether or not the uncontested
25 facts create an issue or not.

1 So when you consider this Motion for Summary
2 Judgment -- and I would suggest that we handle it this way,
3 that we initially hear argument from Envirocare's counsel.
4 They are the parties -- the party bringing the motion, that
5 they present whatever information they would like to to
6 supplement the pleading that they've already given to you.

7 Then we hear a response from the interveners,
8 or from the staff, the Executive Secretary, and then you
9 look at and decide these issues.

10 The motion has been presented for all of the
11 issues raised in the proceeding and it would be appropriate
12 for the board to consider those individually. There are
13 clearly, in my opinion, some of these issues that are
14 questions of law. You do not need to take evidence. You
15 now have the argument presented as a result of the Motion
16 for Summary Judgment and you can make a ruling on some of
17 those.

18 And so as you take those issues -- and I
19 think there is probably eight or nine of them that are
20 presented; and we can go through that, and that may be the
21 most efficient way to do it. The board will need to decide
22 on this particular issue, is this something that we need to
23 take witness testimony on because it's contested as far as a
24 factual matter or is this something that is just an argument
25 of law and we can decide it at this point in the proceeding.

1 Once you make those decisions you are left
2 with, then, the number of issues, you know, if any, that you
3 would be hearing. It culls down the process. It eliminates
4 argument on those issues that you don't need to take
5 testimony on.

6 So that's the process that you use, and it's
7 a way of moving toward a hearing, focusing in on the facts
8 that you want to ultimately hear. So I would suggest, then,
9 that the board hear from Envirocare's counsel and then hear
10 from FAIR's representatives and the other interveners.

11 Mr. Nelson: Are you suggesting that we hear
12 per issue?

13 Mr. Fred Nelson: I think they present their
14 arguments.

15 Mr. Nelson: For all issues?

16 Mr. Fred Nelson: For all issues, hear a
17 response for all issues and then the board consider it. I
18 think it would take too long if we did it individually.

19 Mr. Nelson: Okay. Sure.

20 Mr. Fred Nelson: And you have had a chance
21 to read the pleadings too, so I would hope that it would be
22 the supplement to the pleadings or referring to the
23 pleadings is what they would do.

24 Mr. Nelson: All right.

25 Is the board amenable to this approach?

1 Well, let's proceed then and hear first from Envirocare.

2 Mr. Holtkamp: Thank you, Mr. Chairman.

3 My name is James Holtkamp, counsel for
4 Envirocare. And I will try and be brief.

5 We did submit in our pleadings, I think,
6 pretty extensive rationale for our Motions for Summary
7 Judgment. Mr. Nelson has articulated very well the standard
8 for Motion for Summary Judgment. I would just add that this
9 mechanism has been used by courts and adjudicative bodies
10 and now you are sitting as an adjudicative body, as far as I
11 can tell, since the Battle of Hastings. I mean, it's tried
12 and true. It's a way for courts and adjudicative bodies to
13 get to the real issues.

14 We vigorously dispute any assertion that
15 there is any denial of due process associated with the
16 summary judgment mechanism. FAIR has had ample opportunity
17 to present its issues and arguments. What we are talking
18 about is whether or not there is any evidence that needs to
19 be presented.

20 I would simply note that a close reading, or
21 even a not-so-close reading, of FAIR's submittal indicates
22 that they are not presenting in any way, shape or form
23 anything to indicate that the facts are in dispute.

24 Now, they disagree with the conclusions of
25 the Executive Secretary, they disagree with his findings.

1 They suggest that in some regards the record doesn't support
2 the Executive Secretary's findings, but in no case have they
3 submitted a proffer of evidence, meaning some indication of
4 what they would testify to that is different than the
5 record. They have not submitted any affidavits. All they
6 have are unsupported assertions that, well, gee, we disagree
7 with what the Executive Secretary did.

8 We think that every one of these issues is a
9 summary judgment issue. As Mr. Nelson indicated, some of
10 them are clearly and purely matters of law. Some of them
11 are uncontested record issues, again matters of law, just
12 disagreements with what the Executive Secretary has done.

13 In essence, FAIR wants the board to look over
14 the Executive Secretary's shoulder and take into account
15 some things that really aren't required. FAIR is
16 essentially adding to the rules. FAIR has, in many cases,
17 has misread and selectively pulled out portions of the
18 Executive Secretary's decision as the license to support
19 their arguments and we don't think that there is any reason
20 to take up the board's time and resources with an
21 evidentiary hearing on these issues. And we believe they
22 can be disposed of here.

23 Just -- I am just going to hit some
24 highlights very quickly because we have in detail responded
25 to the arguments that FAIR has made, but I just want to make

1 some points.

2 FAIR has argued that the secretary's finding
3 that there is no unreasonable risk to health of the
4 environment is unsupported by the record. They simply
5 complain that the Executive Secretary's conclusion has a,
6 quote, insufficient basis, close quotes, in the record, but
7 they do not offer any facts or any affidavits suggesting
8 anything that would cause a different conclusion. They
9 simply suggest that the conclusion is wrong.

10 Same thing holds true with their arguments
11 about the findings on emergency response. The same thing
12 holds true with regard to transportation.

13 I should note that in their pleading FAIR
14 suggests that there are some general US Department of
15 Transportation annual publications that give information
16 about transportation generally in the United States, but
17 they do not indicate how any of those publications would
18 differ from what is in the record, nor how any of those
19 publications would lead or result differently than the
20 Executive Secretary's result.

21 They talk about the prelicensing plan
22 approval and complain about some procedural aspects of that,
23 but, again, there are no facts in dispute. That is purely a
24 matter of law. That's an interpretation of the procedures
25 in the rules and, as we indicated in our pleading, we

1 believe that there were no procedural deficiencies.

2 A large part of their submittal is devoted to
3 the issue of land ownership, an issue which this board, not
4 another body, not the Executive Secretary, but this board
5 considered over a year ago. And in effect what FAIR is
6 doing is asking for the board to reconsider its decision.

7 There are a number of problems with that kind
8 of a request, not the least of which is that a petition for
9 reconsideration is not something that is timely if it is
10 made over a year after the original decision.

11 And we set forth in our brief all of the
12 reasons why we believe their arguments are not legally
13 well-founded, but they have offered no additional
14 information. This is, again, purely an issue of law. The
15 board is to decide whether or not they even should be
16 reconsidering their decision. We think that's inappropriate
17 and the decision was made by the board over a year ago and
18 FAIR did not challenge it at that time.

19 Some of the other issues they complain about,
20 the timing of the generator site access requirements.
21 Again, that's purely a legal determination. They complain
22 about some of the issues relating to ownership of the
23 facility, purely a legal determination. There are no facts
24 in dispute there.

25 They complain about what they characterize as

1 the license being conditioned on certain requirements.
2 Again, that's a matter of interpretation of the license and
3 interpretation of the law. There are no factual disputes
4 there.

5 They suggest that the Northwest Compact did
6 not authorize the receipt by Envirocare of this particular
7 waste treatment. Again, that's a matter of interpretation
8 of the compact, of the compact's resolutions, of the license
9 and all of those kinds of things.

10 And then as a parting shot they again
11 complain about alleged prejudice and bias, an issue which
12 was conclusively determined at a prior board meeting and
13 which, again, they have proffered no facts, there has been
14 no affidavit, nothing other than some unsubstantiated
15 assertions.

16 In each and every case we believe that the
17 Executive Secretary's determination is based on the record.
18 The record is complete and thorough. You have the record
19 available to you. And we believe that each of these issues
20 can be disposed of by the Summary Judgment Motion and we
21 believe, in fact, that each of these issues, when examined
22 in the light of the law and the record, would lead to the
23 conclusion that the Executive Secretary's decision was the
24 correct decision, operating within his discretion which the
25 statute gives to him to issue the license.

1 And I think that's all I'll say about that.
2 If anyone has any questions, I would be happy to respond.

3 Mr. Nelson: Questions for Mr. Holtkamp?
4 Apparently not at this time.

5 Mr. Holtkamp: I left you speechless, I
6 guess.

7 Mr. Nelson: Thank you.

8 Mr. Holtkamp: Thank you.

9 Mr. Nelson: Yes.

10 Ms. Lockhart: I would have a very brief
11 comment that FAIR may wish to respond to, so it probably
12 makes more sense for me to go next.

13 Mr. Nelson: Then by all means come and make
14 it.

15 Ms. Lockhart: Okay. I just -- I am not
16 going to say much about the substantiveness of this, we'll
17 let Envirocare carry the day on this motion, but I did want
18 to remind the board that this is a de novo proceeding. And
19 what that means is, among other things, is that you may
20 consider findings made by the Executive Secretary, but you
21 are not bound by them.

22 And a corollary of that is that any alleged
23 failure in the Executive Secretary's findings is really
24 irrelevant to this proceeding. It can be corrected in this
25 de novo proceeding.

1 And also, because it's a de novo proceeding,
2 you may consider additional information that has passed
3 since the time of the initial license, for example, the
4 generator site access information.

5 That's all I wanted to say.

6 Mr. Nelson: Thank you.

7 Any questions on that? Okay.

8 We'll now hear from FAIR.

9 Mr. Groenewold: Thank you, Mr. Chairman of
10 the Board.

11 For the record, my name is Jason Groenewold.
12 I am the Director of Families Against Incinerator Risk.

13 I think what Envirocare is attempting to do
14 is prevent this board from really looking at the heart of
15 this matter. And I think during an era where we have seen
16 companies like Enron systematically remove regulatory
17 oversight from their proceedings, we can see what type of
18 impact that has.

19 And I think what this board should consider
20 is how many eyes can take a look at the decision that the
21 Executive Secretary has made and that we should make every
22 attempt to review that decision, especially for matters of
23 this significant importance, where we are talking about
24 accepting dismantled nuclear reactors in our community.

25 One of the things that the board has to

1 consider is whether or not they do have the authority, in
2 fact, to grant a Motion for Summary Judgment. And then in
3 looking at a Motion for Summary Judgment, whether or not
4 there are any material issues of fact that are in dispute
5 and, again, whether or not the board can grant that Motion
6 for Summary Judgment. Certainly a Motion for Summary
7 Judgment is common in court proceedings. It's done as a way
8 to limit trials by jury, if it can be done that way, and
9 looking at issues that are just related to matters of law.

10 This particular issue that we are dealing
11 with right now, the board has not been granted authority by
12 the Utah legislature under the Administrative Procedures
13 Act, nor in its own rules, to take on this type of judgment
14 for Motion for Summary Judgment. There is no proceedings
15 that have been outlined in your rules for how to do that.

16 Now, Rule 53 would govern how one would do
17 that, but the question is, does the board itself -- have you
18 given yourselves the authority to even hear a Motion for
19 Summary Judgment. And to this point you have not. And so
20 it's inappropriate to grant a Motion for Summary Judgment
21 without that authority.

22 I also think, when we look at what issues are
23 in dispute, we really need to get into the case before you.
24 One of the things that we are challenging is did the
25 Executive Secretary find that the issuance of this license

1 would not cause detrimental harm to public health and the
2 environment. There are serious issues of fact that are in
3 question in regards to that, not the least of which is did
4 the Executive Secretary adequately consider transportation
5 accidents and what type of impact that would have on
6 citizens in this community.

7 Did the Executive Secretary adequately look
8 at whether or not exposure from the products that Envirocare
9 is bringing into this state would cause harm to the citizens
10 of the state of Utah.

11 And what we are asking this board to do is
12 relook at the information that was submitted during the
13 record, not just take the Executive Secretary's word for it,
14 but go back and look at the evidence that is on the record,
15 and the only way that we can present that evidence is with a
16 full hearing.

17 One of the things that the Motion for Summary
18 Judgment would exclude is the ability to bring forward
19 evidence, to cross-examine witnesses and to rebut any
20 evidence that is put forward by the parties. And I don't
21 understand why the board would want to exclude that type of
22 full disclosure of these proceedings simply to compensate
23 for Envirocare wanting to move forward on this process.

24 One of the other issues that we are
25 questioning and believe that there definitely is facts in

1 dispute on the basis of what the Executive Secretary decided
2 is whether or not the -- Envirocare has met the requirements
3 for emergency response. You know, have they, in fact,
4 ensured that adequate emergency response is in place and
5 that they have a coordinated plan to deal with that not only
6 on-site but off-site, including the transportation of these
7 materials through the state of Utah.

8 We have gone through the record and included
9 information in our brief that seriously questions whether or
10 not that has adequately been done, and the only way for this
11 board to determine that is to have a full hearing where that
12 evidence can be presented.

13 One of the other things is Envirocare argues
14 that the land ownership exemption we did not challenge in a
15 timely manner. But if the board remembers, when that land
16 ownership exemption was granted there were two things; one
17 is that the Executive Secretary incorporated that land use
18 exemption to the issuance of the license itself, meaning
19 that is the first time on official record that the Executive
20 Secretary is making that motion -- or that approval.

21 When the board granted the exemption itself,
22 one of the things that they did is conditioned it on
23 approval of the legislature to assume ownership of the site
24 that Envirocare is planning to store this radioactive waste.
25 A bill that was to do that last year was not passed by the

1 legislature. In fact, as it was taken up in committee it
2 did not move through the House of Representatives to the
3 extent that this board conditioned approval of the land use
4 on that action. It hasn't happened. So, therefore, if we
5 are going to decide anything, it should be that the land use
6 exemption is not in place.

7 Secondly, the board conditioned the approval
8 of the land use exemption on the issuance of the license
9 itself. That wasn't done until July, in which case that's
10 the time we appealed the Executive Secretary's decision and
11 all of the issues that we raised in our request for agency
12 action.

13 So those issues very much are in dispute and
14 I think we should flush them out before this board in a full
15 hearing.

16 I think one of the other things to consider
17 before this board is when the exemption for the land use was
18 granted it did not include language related to containerized
19 class A waste. That's something that's significantly
20 outstanding. What Envirocare would like this board to do is
21 take an exemption that was granted to the original land use
22 provisions back in 1991. And when we had a director of the
23 Division of Radiation Control that was involved in a process
24 with the owner of this company, that was very questionable
25 and flushed out during the court proceedings on, you know,

1 whether or not he should have accepted \$600,000 from this
2 owner.

3 Now, Envirocare is trying to use language at
4 that time to say it was a full blanket authority to accept
5 any type of waste that they want at their site. And that's
6 simply not the case. The reason you grant an exemption to a
7 rule is for a very specified time period, for a very
8 specified circumstances. It doesn't grant blanket approval
9 for any time they want to amend their license to then say
10 that that exemption originally -- that original exemption
11 applies to what they are doing now.

12 That fact has proved out by them coming to
13 the board and requesting the exemption for class B and C
14 waste, so, therefore, it applies that they would need to do
15 the same thing for containerized A waste, which they did not
16 and which the board did not grant an exemption for
17 containerized A waste.

18 Envirocare would argue then that, well, since
19 we got the exemption for the higher levels of waste that
20 should necessarily apply to containerized A. But it
21 doesn't. It has to be very specific in granting these types
22 of exemptions what they, in fact, apply to. And you can't
23 just give a blanket approval and say, oh, this is going to
24 apply to anything that they want. And, in fact, you get
25 into the issues related to the Northwest Interstate Compact,

1 that's exactly what's (inaudible).

2 When the Northwest Interstate Compact said
3 Envirocare can accept waste at their site, it was very
4 specific at the time about that this was only certain types
5 of waste and it was only for the license that Envirocare had
6 at that time, which was for NORM and NARM waste, eventually
7 modified to class A waste.

8 So to say that the Northwest Interstate
9 Compact has already given approval for Envirocare to accept
10 class B and C waste is inaccurate and, in fact, the panel
11 has now been informed to discuss that very issue and so that
12 issue is still, in fact -- or that factual issue is still in
13 dispute and with those issues in disputes you can't grant a
14 Motion for Summary Judgment.

15 And I think as you go through -- when we
16 brief this to the board we would lay out a lot of the issues
17 here that are still in dispute and require a full
18 evidentiary hearing, where witnesses can be brought forward,
19 they can be cross-examined and this board can take the time
20 to go through and look at these issues completely.

21 Envirocare wouldn't want to do that. They
22 would rather no one take a look at this, that we exclude as
23 much information as we can from an evidentiary hearing
24 before this board. And it goes against the spirit of the
25 law which this board has adopted, which says that the board

1 shall afford to all parties the opportunity to present
2 evidence, argue, respond, conduct cross-examination and
3 submit rebuttal evidence.

4 You can still make the same findings in an
5 evidentiary hearing. You don't need to grant Motion for
6 Summary Judgment. And if the presiding officer chooses to
7 streamline the process or eliminate certain evidence from
8 being presented, the presiding officer can do that.

9 You know -- I mean, if there was -- on the
10 record someone gave testimony during the hearings about
11 little green men, you know, the presiding officer could
12 decide that that's just simply not appropriate for these
13 proceedings, and we would agree with you.

14 So the point is there is ways in the process
15 and the mechanisms are in place to have an efficient hearing
16 before this board. That's what we should be doing, is
17 getting to the full evidence. We have many issues that are
18 still in dispute and require that process of examining and
19 cross-examining witnesses and presenting evidence to this
20 board so that you can look at the Executive Secretary's
21 decision.

22 Envirocare wants to say that, well, because
23 the Executive Secretary made a decision, all of these issues
24 have been resolved. And what our request for agency action
25 does is it calls into question the adequacy of those

1 decisions and whether or not the record, in fact, supported
2 the conclusions that the Executive Secretary came to.

3 We don't think that they do, and the only way
4 that this board can fully examine that is to have a full
5 hearing. That's what you should do. This Motion for
6 Summary Judgment should be denied not only because of the
7 issues that are still in dispute, but this board has not
8 demonstrated that it's, for itself, claimed the authority to
9 grant a motion for summary judgment. It's that simple, and
10 we would ask that you deny this and that we then get to the
11 full hearing and present the evidence to this board.

12 I will take any questions that you may have.

13 Mr. Nelson: Questions for Jason?

14 I have one. Let me take as an argument your
15 first issue you raised about unreasonable risk to the health
16 and safety of the public. I guess I'll be a little blunt.
17 I want -- I would like to have some idea in a formal hearing
18 what sort of witnesses you would call and what sort of
19 testimony they would give that would refute this. And,
20 quite frankly, up until this time I haven't heard any facts
21 presented by FAIR that tells me how somebody is going to get
22 a dose.

23 Mr. Groenewold: I think what you are asking
24 for is what would be most appropriately discussed and
25 presented.

1 Mr. Nelson: I would like to have some idea
2 of what type of evidence you would plan to present.

3 Mr. Fred Nelson: Can I just make a comment?

4 The purpose for the Motion for Summary
5 Judgment is that you have to proffer some evidence, what --
6 the question that you are asking is most appropriate because
7 unless as a party you can proffer what you intend to prove
8 and raise specifically with affidavits or otherwise, what
9 you intend to present, then you haven't got contested facts.
10 So the question you are asking is appropriate.

11 Mr. Groenewold: I mean, I think one of the
12 things to look at is, you know, what we have briefed in the
13 past. This is an issue where every radioactive waste land
14 fill in this country that has been licensed for commercial
15 disposal has leaked its radioactive contents into the
16 environment. That's the record, six for six. Envirocare is
17 now the seventh seeking approval to dispose of this material
18 in a manner that has been tried elsewhere and has failed.
19 Do we want to continue to repeat that same cycle? And
20 that's the types of evidence that we are going to put on.

21 Furthermore, you know, the burden is on the
22 party seeking the license to show that their license isn't
23 going to cause harm to the public. And what we go through
24 and do is show that, all right, there have been
25 transportation accidents. What happens if an accident does

1 occur while they are moving this material out to the state
2 of Utah? Do they, in fact, actually have the ability to
3 respond to that type of an accident and are people in this
4 community, the emergency responders, adequately prepared to
5 deal with that? You know, we'll put forward evidence that,
6 in fact, they are not prepared to deal with this kind of
7 circumstances.

8 You know, when we talk about the soils and
9 the actual canisters that Envirocare plans to use; will
10 those be, in fact, adequate to contain the materials that
11 they plan to transport here for the length of time that
12 these materials will remain harmful to people in this
13 community?

14 And the evidence that we'll put forward is
15 that they don't. And what happens if those containers don't
16 hold up and where do those materials then migrate to and who
17 will be exposed at that time? You know, we do plan to put
18 that information and that evidence before this board and
19 those are witnesses that we'll bring at that time.

20 I think when we get into the issue about the
21 Northwest Interstate Compact, yeah, there is resolutions
22 that exist on that. We could present that evidence to the
23 board and have this board fully deliberate on that and start
24 looking at that, bring in some of the people who, you know,
25 have already looked at that -- or, excuse me, you know, that

1 are involved with that process, you know, to say whether or
2 not it was intended that approval back in '91 or '92 or '98,
3 you know, don't apply to class B and C radioactive waste.
4 You know, it does not.

5 So, by all means, we plan to bring evidence
6 before this board and I think there are serious questions in
7 place about whether or not this license is going to protect
8 public health in the state of Utah.

9 Mr. Nelson: Any more questions?

10 Mr. Julander: I'm thoroughly confused now by
11 the comment you made. As we vote on summary judgment we are
12 certainly not in a position to judge on evidence. I thought
13 that was the point of summary judgment, to get rid of those
14 questions that did not involve disputation of fact.

15 Mr. Fred Nelson: Let's just use an example.

16 It's pretty clear in my mind that the
17 generator site access issue there is no factual dispute. We
18 know exactly when the rules were promulgated, we know what
19 was done. It's simply an argument as to what is the
20 appropriate approach there. You have all the information,
21 you have all the evidence you need to make a decision on
22 that. There is no contested questions other than the way
23 it's interpreted, the way it's focused. So that's the kind
24 of issue, in my opinion, that's appropriate, that you look
25 at what's been presented and rule on it. In my opinion, you

1 can rule today on that issue, the generator access issue,
2 because Mr. Groenewold has had an opportunity to present his
3 arguments in the pleading and Envirocare has presented their
4 arguments, and if there is a problem with that issue you can
5 decide that.

6 The summary judgment process is to try and
7 figure out what parties are going to argue and what's
8 disputed. So when you say, I believe that the Executive
9 Secretary did this correctly or incorrectly, you have to say
10 why and who you are going to propose as being the witness to
11 say that and why and --

12 Mr. Julander: At this point.

13 Mr. Fred Nelson: At this point, right.

14 Otherwise there isn't anything that's contested. You don't
15 need to prove your whole case, you just need to say, I am
16 going to present so and so witness to testify that the
17 emergency response plan was inadequate and that there are
18 these deficiencies in that emergency response plan. That's
19 the kinds of issue that needs to be looked at.

20 Mr. Nelson: Any more questions for -- I see
21 Mr. Holtkamp wanting to make a comment, so why don't you
22 come on up. We want everybody to be heard.

23 Mr. Holtkamp: I'm just getting close here --
24 that's okay, Jason -- so the court reporter can hear me.

25 I just want to make one correction and --

1 Mr. Groenewold has stated on more than one occasion there is
2 no statutory authority for this board to entertain a Motion
3 for Summary Judgment and I just wanted to give you the
4 statute that explicitly says that an agency involved in the
5 adjudicative process has available to it summary judgment as
6 one of its options, and that is Section 63-46B-1, subsection
7 4 of the Utah Code. It's explicit in the Utah
8 Administrative Procedures Act and for anyone to suggest that
9 it's not there is just flat wrong.

10 Mr. Nelson: Do you want to respond, Jason?

11 Mr. Groenewold: Yeah, I would like to.

12 That provision of the statute does not
13 preclude this board from doing it, but what it requires is
14 for the board to give itself that authority in its
15 rule-making. There are other administrative bodies that for
16 themselves have adopted the ability to grant a Motion for
17 Summary Judgment. To date this board has not done that. If
18 you go through the rules you will not see anywhere that the
19 board has given itself that authority. So while that
20 provision doesn't preclude it, it certainly has not
21 authorized it and this board, for itself, has not taken up
22 of that ability to do so.

23 Mr. Nelson: Okay. Thank you.

24 Questions or comments?

25 Mr. Julander: Can we ask our --

1 Mr. Hunsaker: Let's have our legal attorney
2 give a --
3 Mr. Nelson: Sure. Why not.
4 Mr. Fred Nelson: I agree with Envirocare.
5 It's clear that this is a normal process for administrative
6 boards. I don't know of a court that has ever ruled or an
7 administrative body has ever ruled that a summary judgment
8 is not an appropriate process.
9 Mr. Nelson: Okay. The view from our
10 attorney. Thank you.
11 Well, I think we have heard from all of the
12 parties. We have a motion before the board. We won't have
13 any discussion. Do we want to go one by one down the items?
14 Mr. Julander: Do you need a motion for that?
15 Mr. Nelson: Okay. Let's have a motion to
16 consider one at a time. Is that the motion we need?
17 Mr. Julander: Yeah.
18 Mr. Nelson: Has somebody made that?
19 Made by Rod Julander. We have a second?
20 Seconded by Kent Bradford.
21 Okay.
22 Mr. Julander: May I ask for a clarification?
23 If -- if this board votes yes on every one of
24 those, then there will be no hearing, is that correct?
25 Mr. Fred Nelson: That's right.

1 Mr. Julander: If we vote yes on -- if we
2 vote no on one, then the hearing will be restricted to that
3 one topic?

4 Mr. Fred Nelson: Yes. The ones that you
5 want to hear further testimony on will be the ones that you
6 deny the Motion for Summary Judgment and the hearing then
7 would be restricted to those issues. You would have granted
8 summary judgment on the other issues and an order would have
9 been prepared for the chairman to sign that would decide
10 those issues.

11 Mr. Nelson: Okay. Thank you.

12 Karen.

13 Ms. Langley: So what is before us right now
14 is to decide whether we are going to take that path or
15 whether we are just going to begin to look at each item. I
16 am not sure when you said go down the items.

17 Mr. Nelson: I think we are going to -- what
18 my understanding is -- is that we are going to begin to
19 consider each item.

20 Ms. Langley: So we are beginning that
21 process?

22 Ms. Nielson: No. Let me clarify. I think
23 what we are doing is considering whether we would support or
24 reject summary judgment.

25 (Discussion off the record.)

1 I think what we are doing is deciding whether
2 we would support or reject the Motion for Summary Judgment
3 relative to the specific issue and that we would do that
4 issue by issue rather than taking them all as a lump.

5 Ms. Langley: Okay.

6 Ms. Nielson: But to actually hear the
7 information, if we decided we wanted to hear more
8 information, that would come at a different time.

9 Mr. Fred Nelson: Yes. It should be noted,
10 though, that if, you know, this is just simply a question of
11 law, for example, the generator site access issue, you are
12 actually considering the substantive merits of that issue
13 and ruling on it. And so it's a decision that you were
14 accepting the arguments and granting summary judgment.

15 Mr. Nelson: Okay. All right. So number
16 one. Do we want to have any --

17 Ms. Nielson: Yeah. We have got a motion
18 before us, I think.

19 Mr. Julander: The motion to --

20 Mr. Nelson: Okay. All right.

21 Ms. Langley: That's where I was getting.

22 Mr. Nelson: Okay. Got you.

23 Mr. Johnson: Point of clarification. May I
24 clarify something? I would assume from that -- that our
25 original appeal, the points made -- I'm sorry. I should

1 give you my name. My name is Charles Johnson. My name is
2 Charles Johnson. I am with Utah Legislative Watch.

3 But I assume that the one-by-one points that
4 will be considered are those in our original appeal as
5 supplemented by any additional issues that were raised so
6 that none gets left out.

7 Mr. Fred Nelson: My understanding is the
8 Motion for Summary Judgment includes all of the issues
9 raised in your appeal.

10 Mr. Johnson: Okay.

11 Mr. Nelson: Well, I would also assume we can
12 only -- since Envirocare has made the motion, we can only
13 vote on those items in Envirocare's motion.

14 Mr. Fred Nelson: Right.

15 Mr. Nelson: Okay. Okay. So let's take a
16 vote on --

17 Mr. Julander: Can I get one more
18 clarification?

19 If they have some issues that are not brought
20 up under summary judgment, then they are not included in the
21 summary judgment, is that correct?

22 Mr. Fred Nelson: That's right. If there are
23 issues that were not brought up in summary judgment, they
24 ought to make that clear because I thought that it was a
25 comprehensive motion dealing with each of the paragraphs in

1 their motion -- in their petition.

2 Mr. Holtkamp: That is correct.

3 Mr. Julander: Can we give them the
4 opportunity to indicate that that's true or not?

5 Ms. Nielson: That would be helpful to
6 understand. It sounds like Envirocare believes that they
7 were all covered, and maybe we need to know if there are --

8 Mr. Nelson: Teryl.

9 Mr. Hunsaker: I know this is apt to be
10 time-consuming, but as we go through each one of these
11 issues, for example, this first one, FAIR has failed to
12 establish that its legal interest is substantially affected
13 by the assurance of the amendment.

14 Is it appropriate to perhaps have a comment,
15 if you will, from Jason and a comment from Envirocare and
16 then a comment from our attorney on each one of these as we
17 go through them, not an elaborate one but you know, just a
18 minute comment to put things in our mind a little better?

19 Mr. Fred Nelson: That's -- the board can do
20 that if they would like.

21 Mr. Hunsaker: I know it's time-consuming
22 but --

23 Mr. Nelson: Well, I -- I agree that it's
24 time-consuming, but I personally think that if somebody
25 wants to very quickly summarize the core of their position,

1 I think that can only help the board.

2 Ms. Nielson: So is that included as part of

3 the motion that we are going --

4 Mr. Julander: Yes.

5 Mr. Hunsaker: Okay.

6 Mr. Nelson: If Dr. Julander says that's part

7 of the motion we --

8 Mr. Bradford: That's fine. Okay.

9 Mr. Nelson: Is anybody confused on what we

10 are voting on?

11 Mr. Edwards: Yes.

12 Mr. Nelson: Okay. Why don't you restate it.

13 Mr. Julander: The motion is to consider each

14 of these issues separately and to allow each side a very

15 brief moment to summarize their position on each of them and

16 our attorney's recommendations or advice as it relates to

17 each of them.

18 Mr. Nelson: Okay. And that's still

19 seconded.

20 Mr. Bradford: Seconded.

21 Mr. Nelson: Everybody clear now? Okay.

22 The chair just crashed.

23 Let's go around, then, and take a vote, then,

24 on the process.

25 Karen.

1 Ms. Langley: Aye.
2 Mr. Nelson: Greg.
3 Mr. Oman: Aye.
4 Mr. Nelson: Gary.
5 Mr. Edwards: Aye.
6 Mr. Nelson: Aye.
7 Dianne.
8 Ms. Nielson: Aye.
9 Mr. Nelson: Barbara.
10 Ms. Reid: Aye.
11 Mr. Nelson: Kent.
12 Mr. Bradford: Aye.
13 Mr. Nelson: Tom.
14 Mr. Chism: Aye.
15 Mr. Nelson: Rod.
16 Mr. Julander: Yes.
17 Mr. Nelson: Teryl.
18 Mr. Hunsaker: Yes.
19 Mr. Nelson: Okay. That's unanimous.
20 Okay. Why don't we proceed, then, on the
21 first issues to hear from --
22 Mr. Fred Nelson: I think there was one
23 point, though, that needed to be clarified that Dianne asked
24 about, and that was the question of whether or not FAIR
25 believes there are any issues that are not incorporated into

1 their Motion for Summary Judgment. I believe they raised
2 them, haven't they?

3 Mr. Groenewold: Not all of them.

4 Mr. Fred Nelson: What are the issues that
5 you believe have not been asked for summary judgment on?
6 Why don't you come on up?

7 Ms. Lockhart: We have to sit down.

8 (Discussion off the record.)

9 Mr. Groenewold: We pointed out 15 items in
10 our request for agency action. We asked the board to
11 consider 15 items that we are challenging. In Envirocare's
12 request for summary judgment they list nine different issues
13 that they ask this board to make judgment on.

14 And one of them, you know that's standing, is
15 our request for agency review, and that's something that
16 Envirocare tried to address in a follow-up supplement to
17 their Motion for Summary Judgment, but it is not included in
18 their Motion for Summary Judgment.

19 Mr. Julander: Would it be appropriate to
20 hear from them after we've voted on these eight?

21 Mr. Fred Nelson: That would be fine. You
22 can deal with the eight issues -- or it's nine issues, I
23 believe, nine issues, and then rule on those, and then we'll
24 go from there.

25 Mr. Nelson: Why don't we begin, then, with

1 the first one in the Envirocare motion, Roman numeral number
2 one, and hear from Mr. Holtkamp and then from
3 Mr. Groenewold.

4 Mr. Holtkamp: Mr. Chairman, might I suggest,
5 so that we don't keep getting up and down that maybe
6 Mr. Groenewold and I can just sit up here so that he gets
7 up, I get up, he gets up, I get up. If we can -- Jason.
8 We'll let him have the soft chair.

9 I am going to be very brief with each of
10 these, Mr. Chairman.

11 Mr. Hunsaker: Wait just a minute -- Jason --
12 till we get him up here.

13 Mr. Nelson: Okay.

14 Mr. Holtkamp: I am going to be very brief
15 with each of these. And you'll have a sense of deja vu each
16 time I talk.

17 We have, again, detailed in our brief our
18 reasoning, but with regard to the first issue in our brief,
19 which is page two of our Response and Memorandum in Support
20 of the Motion for Summary Judgment, the issue is whether or
21 not the Executive Secretary properly found that granting the
22 license would not constitute an unreasonable risk to the
23 health and safety of the public.

24 In our brief we detail the reasons why the
25 record supports the Executive Secretary's finding. The

1 reason for our Motion for Summary Judgment is that FAIR did
2 not indicate, other than to complain that it should have
3 been a different conclusion, did not proffer any witnesses,
4 did not submit any affidavits, did not indicate any basis
5 for any factual dispute as to what's in the record. It's
6 simply a quibble about whether or not the Executive
7 Secretary made the right decision, which is a matter of law.

8 Mr. Nelson: Jason.

9 Mr. Groenewold: I think on the issue what we
10 are asking the board to do is go back and look at the record
11 and also hear testimony about whether or not the license is
12 actually going to protect public health. You know, look at
13 the issues about whether or not this facility, in fact, is
14 going to, you know, provide general population protection.
15 You know, they don't provide discussion of the relevant
16 conclusions about ground water contamination, you know,
17 metals modeling, soil pathways, surface water or harm to the
18 public. It's all very vague in the process where the
19 Executive Secretary is making his decision.

20 I think it's important for this board to go
21 back and hear the evidence that we put into the record about
22 why this, in fact, is not going to protect public health.
23 You know, there is actual disputes as to how the Executive
24 Secretary interpreted that information. And that's
25 something that's most appropriately decided and heard by

1 this board in an evidentiary hearing.

2 Mr. Nelson: Dianne.

3 Ms. Nielson: I guess I have a follow-up
4 question that's similar to yours.

5 What's -- can you specifically indicate to us
6 areas where you feel or specific issues where the
7 determination of the Executive Secretary is insufficient
8 based on the decision and the supporting material, or are
9 you challenging everything, challenging it equally, and you
10 just consider overall that the determination of the
11 Executive Secretary was insufficient.

12 Mr. Groenewold: Well, I mean, we feel that
13 the Executive Secretary's decision was insufficient. I
14 think when we start looking at the issues about containers
15 and whether or not this facility will actually be able to
16 contain the waste for the length of time that it will remain
17 radioactive, we'll put forward evidence that it will not and
18 that it cannot.

19 You know, the soils analysis did not properly
20 show how corrosive the soils at this facility are and that
21 what we supplemented into the record itself, you know, as
22 was allowed by the board, we put into the record evidence
23 about exactly that. You know, the soil contamination is
24 extremely corrosive for canisters in this area that
25 Envirocare is located, you know, so that's information that

1 we would put before this board. And we think that
2 dramatically alters the decision that the Executive
3 Secretary should have come up with. That is information
4 that was not in the record or anything that the Executive
5 Secretary had in his possession when he made his decision.
6 It's something that was supplemented later on. And so this
7 board can consider information that the Executive Secretary
8 did not, and that's something that would be put forth in an
9 evidentiary hearing.

10 Mr. Nelson: So --

11 Mr. Groenewold: So that's one example.

12 Mr. Nelson: In other words, you might have
13 somebody testify as to canister corrosion and corrosive
14 soils and present a geochemical rationale for --

15 Mr. Groenewold: For how that process would
16 work, right.

17 Mr. Nelson: May I be so bold as to -- do you
18 have someone in mind who might do that?

19 Mr. Groenewold: We have been contacting
20 people in the local community who are familiar with soils
21 analysis and chemistry of soils on materials themselves.

22 Mr. Nelson: Dianne.

23 Ms. Nielson: Mr. Chairman, could I ask a
24 process question?

25 We have Envirocare and FAIR represented here

1 and I know we have a motion -- sorry, I am not using my
2 correct term, perhaps -- from -- on behalf of the Executive
3 Secretary saying -- a response saying that they support the
4 Motion for Summary Judgment.

5 From my perspective, it would be helpful,
6 though, since we are going to take comments from the
7 individual parties, to have some comment from a
8 representative of the Executive Secretary as we go forward.

9 Mr. Nelson: Is there any objection? Okay.

10 Mr. Hunsaker: I feel that's appropriate, you
11 know, point well taken. Did the Executive Secretary or his
12 staff consider canisters and corrosion and soil samples? I
13 would like an answer to that today.

14 Mr. Holtkamp: I might respond to that
15 briefly, that in the licensing proceeding the issue of the
16 container was -- let me put it this way. In assessing the
17 potential risk, if any, to health and the environment, it
18 was assessed as though there were no containers. In other
19 words, it's irrelevant in terms of that assessment. The
20 determination was made that even without the containers and
21 that stuff placed into the soil it was okay. So, to me this
22 illustrates the problem that we have here, because we are
23 going to have a lot of evidence in that's irrelevant.

24 Mr. Groenewold: I mean, I would disagree.

25 Ms. Lockhart: Well, just a moment. I guess

1 I have to speak procedurally for a moment because I --
2 frankly, these issues were not raised in FAIR's response --
3 or in FAIR's response to Envirocare's motion.

4 If you discuss these issues you will
5 essentially be turning this into an adjudicatory hearing, a
6 hearing -- an evidentiary hearing. We are not prepared to
7 do that today, obviously. We are -- we will prepare to do
8 that at some point.

9 If -- the question -- I think the board needs
10 to focus on the question of whether there have been
11 sufficient facts raised by FAIR to make -- to survive this
12 Motion for Summary Judgment. If there have, then the
13 Executive Secretary will be commenting during the
14 administrative proceeding.

15 Mr. Fred Nelson: Can I just read you from
16 the civil procedure rule which is the (inaudible) and
17 specifically referenced in the Administrative Procedures
18 Act?

19 It says, an adverse party may not rest upon
20 mere allegations or denials in his pleadings, but his
21 response by affidavits or otherwise might set forth specific
22 facts showing that there is a genuine issue for (inaudible).
23 If he does not so respond, summary judgment is appropriate
24 to be entered against it.

25 So that's the process here. It's a way to

1 make fairness, get the process in that both parties have to
2 understand what the allegations are and so there needs to be
3 some specific statements, who the witnesses are going to be,
4 what evidence is going to be presented. You can't just rely
5 on general allegations at this stage in the proceeding.

6 Mr. Julander: So even though there might be
7 disputed facts, the fact that they did not bring them up
8 earlier, that they did not put them into the process
9 earlier, they are just out? Is that what you are saying?

10 Mr. Fred Nelson: Well, the board has some
11 discretion there, but technically if the judge were sitting
12 here they would be because it's common knowledge in the
13 practice of law that if you make a Motion for Summary
14 Judgment you have to respond accordingly and you have to
15 present specific information.

16 Now, because Mr. Groenewold is not a lawyer,
17 he may not have understood that. I tried to, in a letter to
18 him, when we granted the extension on reply, point out
19 Rule 56, and that was what the responsibility was. Now, the
20 board can grant him more time if they would like to do that,
21 but at this point in time he has a responsibility to respond
22 to that Motion for Summary Judgment. He can't just wait
23 till the hearing and say, I found a witness yesterday who is
24 now going to testify to this because it's unfair to the
25 Executive Secretary and it's unfair to Envirocare from an

1 information process.

2 And, similarly, Envirocare and the Executive
3 Secretary can't just wait until the day before the hearing
4 and say, wait a minute, we are going to put this witness on
5 or this testimony on. There has to be an exchange of
6 information so that the process is fair, and this summary
7 judgment process is part of that. You need to present what
8 you are going to testify to identify the issues. Otherwise,
9 you will spend years in the process going from one issue to
10 the next without defining what the real problem is.

11 Mr. Julander: Jason, may I ask you what your
12 understanding was?

13 Mr. Groenewold: Of this particular
14 proceeding?

15 Mr. Julander: Yes, of this -- of what our
16 position -- or our business is about today.

17 Mr. Groenewold: Well, that --

18 Mr. Julander: Are you -- what was your
19 understanding in terms of your limitations or your
20 requirements to present to this board before today?

21 Mr. Groenewold: To point out in the record
22 the areas where the facts are still in dispute. And to the
23 extent that Envirocare says, you know, there is not a
24 material fact in dispute, we have pointed to the record and
25 instances in the record where we think that the issues are

1 in dispute. And so that's what we have gone through and
2 briefed in our response to their Motion for Summary
3 Judgment.

4 Mr. Julander: Because it's clearly more than
5 that. You understand now your requirement is more than
6 that?

7 Mr. Groenewold: As far as submitting
8 affidavits?

9 Mr. Julander: Yeah.

10 Mr. Groenewold: Yeah. We certainly did not
11 do that in our response. You know, we felt that during the
12 proceeding where the presiding officer would lay out a
13 schedule for discovery and for identifying witnesses and
14 putting a schedule forth for an evidentiary hearing, that
15 would be the time in which we would announce who our
16 witnesses and experts would be for our case before this
17 board.

18 Mr. Julander: Mr. Chairman, I made more than
19 one motion to delay this, but I hate to do it again, but it
20 might be useful to -- in the business of full disclosure and
21 fairness to grant them a bit of time to comply by the rules,
22 but I would like to ask the Envirocare people what injury
23 this would do you if we do that.

24 Mr. Nelson: Teryl.

25 Mr. Hunsaker: May I make one comment first?

1 Mr. Julander was absent at our last meeting,
2 and if I am correct -- and I have a little different
3 orientation than most of you sitting here; I am an elected
4 official, none of the rest of you are -- I believe it's very
5 important that I base my information on technical
6 information, not emotion or hearsay, and if I recall
7 correctly, last month you instructed FAIR to come forth
8 today with some technical evidence that the Executive
9 Secretary had blundered.

10 Mr. Nelson: In responding to that, I don't
11 think I directed anyone, but I certainly telegraphed the
12 fact that from my perspective I would like to see some
13 indications of some technical deficiencies. I think I was
14 pretty clear about that last time. I don't think I -- I
15 wouldn't characterize them as telling them to go out and do
16 it, but I think on more than one occasion I have expressed
17 my opinion that we need to have some specifics. I don't
18 think I have been unclear.

19 Mr. Julander: In fairness, I am not sure if
20 you expressed it as your opinion that that's conclusive. A
21 legal opinion is what -- really what matters and whether
22 they had FAIR -- whether they clearly were responsible for
23 that, I don't know.

24 Mr. Holtkamp: May I respond, Mr. Julander,
25 to --

1 Mr. Julander: Yes.

2 Mr. Holtkamp: Hopefully this is responsive.

3 One of our concerns has to do with --

4 Mr. Groenewold, I have come to know, is a very bright,
5 capable individual. We also are aware that on the committee
6 that is kind of overseeing this appeal in this organization,
7 also members of his organization and on the boards of the
8 organizations he represents are some very competent
9 attorneys whom I know and whom I have dealt with, and I just
10 want to make a comment that we believe that it would be a
11 great thing if some significant and serious legal counsel
12 were applied to these proceedings.

13 We believe that FAIR has had ample
14 opportunity -- if they haven't availed themselves of it --
15 to take advantage of the resources available to them and we
16 are somewhat nonplussed at the notion that, well, because we
17 have somebody appearing who is not a lawyer, may not have
18 understood all the nuances so, therefore, we are going to
19 postpone things once again, we think that's -- we don't
20 think that's a good thing. We think that they have the
21 resources there. We are not talking about lawyers that are
22 going to charge exorbitant fees, we are talking about
23 members of their organization, some of whom we have dealt
24 with directly and I know personally and are very good and
25 are very capable.

1 So I just say that in response to your
2 question.

3 Mr. Johnson: Mr. Chairman, may I make one
4 brief comment?

5 Again, My name is Charles Johnson. I had a
6 major hand in drafting the original appeal for FAIR and
7 there seems to be some misunderstanding here. The appeal
8 and the response to summary judgment contain extensive
9 demonstration of points that the Executive Secretary's
10 decision was based on faulty evidence or on inadequate
11 evidence or, in some cases, totally inadequate evidence or
12 no evidence at all. I mean, these are factual issues and to
13 argue -- to suggest, rather, that -- that we haven't put
14 forth any facts or any points in the appeal or in the
15 response to the -- Envirocare's Motion for Summary Judgment
16 is simply wrong. The facts and the points are here. They
17 are in the documents that have been provided. So those
18 documents need to be read to see what we find lacking.

19 And let me say that the burden of proving
20 that this stuff is safe is on Envirocare. It's not our
21 burden to prove that this stuff is not safe. We don't have
22 to do that. They have to prove by law that it's safe, and
23 the Executive Secretary has to make such a finding. He has
24 not done that.

25 Mr. Fred Nelson: Let me, for the record,

1 make sure that we understand the relative roles of the
2 parties here. It's concerning as counsel to the board the
3 last statement that the burden -- where the burdens are.

4 In this particular case, it is the burden on
5 the petitioner to demonstrate that what was done is
6 inadequate. It is not the burden of the Executive Secretary
7 to go through every step of the process that he went through
8 and provide all that information to the board. It is the
9 burden on those challenging the process to demonstrate where
10 the inadequacies are.

11 This is different from the licensure process
12 for public hearings are taken -- where testimony is taken in
13 public hearings and the Executive Secretary is making a
14 decision on the overall question. This is a specific
15 challenge to throw out the license and the burden is on the
16 one bringing the petition.

17 Mr. Johnson: If I could just respond. I'll
18 be much briefer than I was last time.

19 That is what we did in our documents. We
20 have pointed out where the inadequacies of the Executive
21 Secretary's decisions lay and those inadequacies are in
22 things that are required by law, by rule or other
23 requirement placed on the decision of the Executive
24 Secretary. Those were not met and that's what we have laid
25 out. I am not suggesting that they now have to prove it's

1 safe. That was a requirement in the licensing procedure.

2 Mr. Nelson: Right. And the finding has been
3 made by the Executive Secretary.

4 Teryl.

5 Mr. Hunsaker: I don't know. This might not
6 help anyone, only me, but Jason alluded to canister
7 corrosion and soil samples, whether they were done or not
8 done. The attorney alluded to the fact that it was part of
9 the program. I'd like the staff member, or the Executive
10 Secretary, who was directly involved in that to come up and
11 discuss that point for me for about two seconds.

12 Mr. Fred Nelson: See, that's the point that
13 Laura raised. We are not having an evidentiary hearing on
14 that issue. The only issue you are deciding today is
15 whether or not there are contested issues that you want to
16 hear.

17 Mr. Hunsaker: Well, then the point is
18 that -- Jason brings up the point that there was an
19 erroneous evidence there, or whatever, but he gives me no
20 evidence to base anything on so I can't make a judgment call
21 in his behalf. I mean, if I have got to sit here and make
22 my decision on total technical evidence which has been
23 presented for me, that which he brought up is not covered
24 here.

25 Mr. Fred Nelson: So the question the board

1 needs to decide is do you want to go to hearing on this
2 issue of questions raised on findings of no unreasonable
3 risk, are there factual issues that have been raised in
4 dispute, do you want to go to hearing on that particular
5 issue.

6 Mr. Nelson: And we also, I think, had a
7 motion. Rod, do we still have a motion?

8 Mr. Julander: It was not seconded.

9 Mr. Nelson: It was not seconded. Okay.
10 Does anyone -- no one intends to second that. Is that true?

11 Mr. Bradford: What was the motion again?

12 Mr. Nelson: If I -- well, I'll let you state
13 what you thought the motion was.

14 Mr. Julander: It was give them time.

15 Mr. Nelson: I thought we had gotten bogged
16 down in other discussion before there was an opportunity for
17 a motion. Okay. So the motion was --

18 Mr. Julander: To delay this hearing for one
19 month based on the proposition that they did not understand
20 what their obligation was in order to win the...

21 Mr. Nelson: Dianne.

22 Ms. Nielson: But I think I just understood a
23 member of that group indicating that they felt they had
24 provided that in the initial petition that was provided to
25 the board that was dated December 20th, '01. So I think I

1 understood that they believed they have stated those issues
2 already and they are just saying you want to go back to our
3 petition and determine if you agree that we have stated
4 those issues. I am back on the first point that's being
5 raised, which is on page five, six and the top of seven on
6 that issue. And I don't see the specifics either that
7 Mr. Groenewold is referencing right now, or other specific
8 shortfalls that they contend exist in the Executive
9 Secretary's decision.

10 So I have looked at their petition and I have
11 looked at their response to Envirocare's Motion for Summary
12 Judgment and I am still lacking specific statements of
13 deficiencies that they see within the decision of the
14 Executive Secretary.

15 So I guess I have to ask Mr. Groenewold, is
16 there some other place besides your initial petition or the
17 response to the motion where you have detailed -- and I
18 realize that might all be arguments in witnesses -- but
19 where you have detailed the specific concerns and
20 deficiencies that you would otherwise bring to us if we went
21 to hearing this.

22 Mr. Groenewold: Yeah. A couple of things.
23 I would maybe back up a little bit further, which would be
24 to the original request for agency action, and use that as a
25 starting point for, you know, the issues and the concerns

1 that we raise to this board.

2 I think you can follow, then, the supplements
3 that were put either in the standing or in our response to
4 such items as the Motion for Summary Judgment and, you know,
5 look at our document to supplement the record as well.

6 You know, I think part of the problem is --
7 at least what I hear the board asking for -- is for us to go
8 through, read what we put in response to the Motion for
9 Summary Judgment. And what we do in the Motion for Summary
10 Judgment is take portions of the record and try to recite
11 them here.

12 Now, there is obviously a lot more detail in
13 the record for summary -- excuse me, in the record,
14 including what we have supplemented, that the Executive
15 Secretary did not consider; that if we get into that, that
16 seems to be more in line with an evidentiary hearing. And,
17 again, I would say it would be the most appropriate for
18 raising these issues with the board, is to be able to do
19 that, have staff members come and be able to testify as to
20 what, in fact, they deliberated on in making their decision
21 and allowing for cross-examination of witnesses.

22 Ms. Nielson: If I can clarify.

23 The document that I'm -- that I'm dealing
24 with here is entitled Request for Agency Action and Review
25 of Petition To Intervene.

1 Mr. Groenewold: Correct, dated August 6th or
2 7th.

3 Ms. Nielson: Yes, 6th. I think we received
4 it on the 8th. Okay. I perhaps may have misstated the
5 date. I think I stated a December date, but I apologize.
6 The document I have is the August 6th submittal and the
7 title of the first issue that we are talking about I
8 guess -- Mr. Chairman, I come back to your original
9 statement. I don't see the specifics of the request.

10 Mr. Nelson: I don't want to be just filling
11 dead air, air time, but I -- again, just to reiterate, I
12 would like to know, or I would have liked to have known, not
13 all the details of the evidence you would intend to present,
14 but I would like to have some expectation as to specifics,
15 is the ground water travel time wrong, have they got wrong
16 retardation coefficients or, you know, something technical
17 that leads to a conclusion that the health and safety of the
18 public would be endangered and I -- from my own perspective
19 on this particular issue, if we are going to go to that
20 phase and hear evidence, I want some reasonable expectation
21 of what we are going to hear and that it presents a
22 viewpoint that the Executive Secretary has made an error in
23 terms of the finding that there is not an unreasonable risk
24 to the public.

25 Mr. Groenewold: I mean, I guess what I could

1 do at this point is, you know, reiterate what we have
2 submitted in response to the Motion for Summary Judgment,
3 you know, where if you go back to the state evaluation
4 report, which is what the Executive Secretary has relied on,
5 you know, as a basis for, you know, saying that it is
6 adequate to protect public health. You know, there is -- in
7 the discussion there is requirements of potential
8 radiological exposure risk to the public from transportation
9 or other accidents. You know, there is no language in Rule
10 313-25-11 that prevents the Executive Secretary from
11 including potential transportation or other accidents in
12 making a finding as to whether or not issuance of a license
13 will not constitute an unreasonable risk to health and
14 safety of the public.

15 You know, and under Section 4.5.1 of the
16 Safety Evaluation Report, where it gets into general
17 population protection, there is no discussion in the
18 relevant subheadings of ground water, metals modeling, soil
19 pathways, surface water or doses to the public of the
20 potential radiological exposure risks to the public from a
21 transportation or other accident.

22 In the subsection of surface water it makes
23 no mention of the bodies of water that radioactive waste
24 traveling to Envirocare's facility would cross or travel
25 alongside. Nor does it discuss whether there would be any

1 unreasonable risk to the health and safety of the public if
2 a truck hauling radioactive waste to the facility rolled
3 over, spilled a cask which then cracked and resulted and
4 fell into one of the bodies of water.

5 Under the air pathways section, the safety
6 evaluation report states, for accident conditions, dust or
7 particulate matter could be released into the atmosphere and
8 inhaled by individuals. It does not say, however, whether
9 such inhalation would pose an unreasonable risk to the
10 health and safety of the public.

11 There is a couple of other items there as
12 well, you know, that I think we have concerns, you know,
13 about the assumptions that the Executive Secretary made in
14 coming to their findings.

15 Mr. Nelson: Kent.

16 Mr. Bradford: Would it be appropriate at
17 that point to make a motion that we rule on this for summary
18 judgment and move on to the next one?

19 Mr. Nelson: Well, sure, unless we've
20 adequately addressed Rod's motion. I don't know if that's
21 still on or not.

22 Mr. Julander: It didn't get seconded.

23 Mr. Nelson: I am not trying to -- just want
24 to make sure where we are at. Okay. Do you have -- that's
25 a motion?

1 Mr. Bradford: I'll make that motion.
2 Mr. Nelson: Okay. Do we have a second?
3 Ms. Langley: Second.
4 Mr. Nelson: Seconded by Karen Langley.
5 Any discussion on the motion?
6 Mr. Julander: I don't think it's necessary.
7 Mr. Fred Nelson: What is the motion?
8 Mr. Julander: We just proceed.
9 Mr. Nelson: Just proceed.
10 Mr. Julander: It doesn't need a motion to
11 proceed because we have already --
12 Mr. Nelson: That's how we are going to go.
13 All right. Okay. So what we have decided, then, is we want
14 to go ahead -- any more discussion on the specifics of Roman
15 numeral number one?
16 In response to your last comment, Jason, yes,
17 you do talk about transportation and ground water modeling
18 but, again -- I don't want to keep harping on it, but I
19 don't see any -- you haven't told us any affidavits of
20 someone who is going to come forward and say, you know,
21 look, the metals modeling is wrong for this reason.
22 Mr. Groenewold: Well, I mean, certainly I am
23 not in a position to provide the evidence myself. You know,
24 that is something that we would need to bring someone in to
25 do and, you know, we have been exploring that right at this

1 time, you know different witnesses that we would be bringing
2 forward and, you know, we don't have them today. We didn't
3 think this was going to be an evidentiary hearing. We
4 thought that would be something better left for laying out a
5 schedule for discovery, allowing for, you know,
6 cross-examination of witnesses, depositions, to get that
7 information.

8 Mr. Nelson: Okay. Any more discussion or
9 questions for Jason?

10 Okay. Shall we go ahead and take a vote?
11 Then on the Motion to -- for Summary Judgment on Roman
12 numeral number one, let's have a yea vote be for summary
13 judgment in favor of Envirocare and a nay reflect the fact
14 that we would go on to hear this item in an administrative
15 hearing. Okay? Okay.

16 Karen.

17 Ms. Langley: Yea.

18 Mr. Nelson: Greg.

19 Mr. Oman: No.

20 Mr. Nelson: Cathleen is not here.

21 Gary.

22 Mr. Edwards: Yes.

23 Mr. Nelson: Yes.

24 Dianne.

25 Ms. Nielson: Yes.

1 Mr. Nelson: Barbara.
2 Ms. Reid: Yes.
3 Mr. Nelson: Kent.
4 Mr. Bradford: Yes.
5 Mr. Nelson: Tom.
6 Mr. Chism: Yes.
7 Mr. Nelson: Rod.
8 Mr. Julander: Reluctantly yes. I think the
9 law requires me to vote yes on this.
10 Mr. Nelson: Okay.
11 Teryl.
12 Mr. Hunsaker: Yes.
13 Mr. Nelson: Okay. It looks like there has
14 been a summary judgment under Roman numeral number one in
15 favor of Envirocare.
16 Okay. Let's go to Roman numeral number two,
17 then, and proceed.
18 Mr. Holtkamp: Reliably, Mr. Chairman, Roman
19 numeral two we have divided into three parts A, B and C, but
20 they are related.
21 This is the claim that the Executive
22 Secretary did not properly find that certain of the
23 requirements relating to prelicensing application were
24 completed, specifically emergency response coordination, on
25 and off-site response planning and transportation routing

1 requirements.

2 Again, in detail our brief sets forth the
3 portions of the record that are -- the record that is there
4 to support the Executive Secretary's findings. FAIR has not
5 proffered any evidence through affidavit, list of witnesses
6 or anything else that would show that there is any disputed
7 fact here and so, as a result, as with the others, we
8 believe that a Motion for Summary Judgment is justifiable.

9 Mr. Nelson: Jason.

10 Mr. Groenewold: I think, looking at what
11 this issue is and what it requires, is for Envirocare to
12 have a plan in place with emergency responders to ensure if
13 an accident does occur either on-site or during the time of
14 transport of their materials to their facility, that if an
15 accident were to occur that they have a contingency plan in
16 place with emergency responders to appropriately handle and
17 deal with that.

18 If you look at the record, there actually is
19 quite a bit of dispute as to whether or not Envirocare has
20 actually met this burden. There was testimony given during
21 the proceedings itself by different members of the
22 community, Dr. David Hall, for example -- excuse me, David
23 Smith testified that he had called to various facilities in
24 the state of Utah to ask them whether or not they had, in
25 fact, agreements in place with Envirocare to provide

1 emergency response and they responded that they did not.

2 Envirocare says that this an issue that, you
3 know, is -- well, at least in the licensing decision the
4 contingency plan generally addresses emergencies associated
5 with fires, explosion and releases but it lacks specifics on
6 each type of emergency.

7 The application states that the contingency
8 plan is under revision and will be submitted with
9 Envirocare's license application to amend the radioactive
10 materials license to allow disposal of class B and C waste.
11 Some of the expected changes to the contingency plan, which
12 were apparently drafted in April of 1997, were provided that
13 discussions of emergency response procedures related to
14 medical emergencies in more detail.

15 The October '97 revision of the contingency
16 plan does not contain these changes. And this is a finding
17 in the evaluation report that -- at S32. The applicant's
18 response to interrogatory UE-S32-1 discusses Envirocare's
19 on-site emergency response procedures in somewhat more
20 detail than provided in the 1997 contingency plan. The
21 response also specifically addresses hazards associated with
22 class B and C waste. This information should also be
23 included in the revised contingency plan along with relevant
24 -- along with references to relevant site procedures and
25 training requirements.

1 When the next revision of the contingency
2 plan is available it needs to be reviewed to assure that
3 expected changes were made.

4 The basis for the finding in EU-S33 includes
5 an acknowledgement that, quote, the application states that
6 Envirocare will provide any additional coordination details
7 with its revised contingency plan submitted with its
8 amendment to radioactive materials license for B and C
9 waste.

10 Some of the expected changes to the
11 contingency plan apparently drafted in April of 1997
12 discusses emergency response procedures for coordinating
13 with the University of Utah and AirMed. These changes also
14 address the need to decontaminate victims before transport
15 by AirMed.

16 The October '97 revision of the contingency
17 plan does not contain these changes. Therefore, when the
18 next revision plan is made, it needs to be reviewed to
19 assure that expected changes were made.

20 Envirocare's Response and Memorandum in
21 Support of the Motion for Summary Judgment cites
22 Envirocare's revised prelicensing application of March 15th,
23 2000 and the site evaluation report findings EU-S32 and
24 EU-S33 as adequate evidence that the license met the
25 requirement of Rule 313-25-3(9)(a). However, based on the

1 plain language contained in the responses that Envirocare
2 provided, it is clear that they have not met those
3 requirements.

4 Moreover, the prelicensing plan approval
5 application contains references only to the existence of a
6 few entities beyond the Division of Radiation Control,
7 Department of Environmental Quality and the Tooele County
8 Sheriff's Office, such as two helicopter services, the US
9 Bureau of Land Management and the Utah Highway Patrol, but
10 claims no coordinated emergency response plan with these or
11 any other agencies, contrary to the requirements of
12 R313-25-3(9)(a). It is at least as likely that the
13 hazardous material team, if such teams are available, or the
14 Sheriff's offices of cities and counties located along the
15 proposed transportation routes throughout the state, rather
16 than the few agencies that Envirocare included in its
17 application, would be first responders in the case of an
18 incident such as an accident, spill or fire involving class
19 B and C radioactive waste.

20 Envirocare has not shown that it has these
21 coordinated emergency response plans with these local and
22 regional emergency response resources and, further, whether
23 or not they are actually prepared to deal with an accident
24 that might occur.

25 As to whether or not Envirocare actually has

1 a plan approval application that met R313-25-3(9)(b). This
2 requires that the -- Envirocare's application include plans
3 for responding to emergencies both at the site and those
4 involving the transport of waste within the state. Further,
5 this rule states that details of the proposed emergency
6 response plan shall be given in the plan approval
7 application and will be stipulated in the plan approval and
8 radioactive materials license.

9 Envirocare has not provided the details in
10 its plan approval application of emergency response for
11 incidents that occur off-site, contrary to the requirements
12 of this rule. The license itself does not contain details
13 of the required emergency response plan. Envirocare
14 contends that the Executive Secretary had the authority to
15 waive this requirement because Envirocare would most likely
16 not be the first responder on incidents that occur off-site.
17 However, by imputing a meaning of R313-25-3(9)(b) it goes
18 against the plain language of the rule and the Executive
19 Secretary has acted arbitrarily and capriciously against the
20 public interest in granting the exemption.

21 So, again, you know, this is an issue right
22 there where Envirocare has not demonstrated that they have
23 met the rules that require for a license.

24 Mr. Holtkamp: You don't want me to read into
25 the record portions of my brief, do you?

1 Mr. Groenewold: Well, I mean, to the extent
2 that this board is making decisions, you know, we do want to
3 establish quite clearly that, you know, the issues related
4 to transportation and emergency response are vague, at best,
5 as to how Envirocare actually plans to deal with an accident
6 that might occur during transportation.

7 You know, and this board has a responsibility
8 to ensure that in the Executive Secretary issuing the
9 license to Envirocare to accept this material that they, in
10 fact, have provided adequate protection for public health
11 and we don't feel that those agreements are in place, that
12 they are adequate and, therefore, you know, Envirocare
13 should not be granted a Motion for Summary Judgment on this
14 matter.

15 Mr. Nelson: Any questions?

16 Ms. Nielson: Question, first of all, for
17 Mr. Holtkamp.

18 I think, unless I misunderstood you, you
19 indicated in your -- in summarizing the response that there
20 were three subparts that FAIR had raised and I count four
21 and I just -- I wanted to --

22 Mr. Holtkamp: That's probably --

23 Ms. Nielson: There is an A, B, C, D.

24 Mr. Holtkamp: That's most probably a
25 function of how we have edited. Under Roman two there is

1 some discussion about the prelicensing proceedings and then
2 we move to -- so I guess that would count as one and then
3 there is A, B and C under that. So I think that's probably
4 where the confusion lies.

5 Ms. Nielson: Okay. Let me raise the
6 question -- and you can tell me whether you consider this to
7 be relevant to the section that we are talking about right
8 now.

9 In FAIR's response, on page six -- it starts
10 on the bottom of page five. It's capital D. It seems to me
11 there are two issues that are raised there, one, whether
12 they are timely in -- or they are responding to two issues.
13 One issue is whether they were timely in raising this issue
14 and the second is whether there is technical sufficiency for
15 the decision.

16 Mr. Holtkamp: That's exactly right, because
17 these issues were considered in the site evaluation report,
18 which was part of the siting process, which was the
19 prelicensing process. There was ample opportunity at that
20 time, both for FAIR to comment as to the -- whatever the
21 proposal was, but also it's our position that there was a
22 time then that they could have raised the issue and not now.
23 So that's what we are talking about there.

24 Ms. Nielson: But what I then hear FAIR
25 indicating is that the final SiER was filed on July 9th of

1 2001 and so they considered that to be the appropriate date
2 on which to appeal. And I am not trying to get into the
3 legal arguments, I am just trying to a little bit better
4 understand why you consider the first date was the
5 appropriate date and they consider the second one was.

6 Mr. Holtkamp: Well, because there are two
7 processes -- there are many processes, but it was at -- the
8 siting process was a separate process and it was
9 incorporated into the license.

10 The overarching issue for us with regard to
11 this motion, however, is what we have stated, and that is
12 that other than complaint about the result, there has been
13 no proffer, no indication, nothing to indicate who, what,
14 how, any evidence that would controvert the findings; they
15 were just general allegations.

16 Ms. Nielson: Thank you.

17 Mr. Hunsaker: Does our legal counsel have
18 any comment?

19 Mr. Nelson: Do you have anything, Fred?

20 Mr. Fred Nelson: No, except I think it would
21 be appropriate for me to state that I believe that the
22 issues with respect to the site evaluation process would be
23 available for the board to consider because until the
24 license is finally issued we have taken a position that
25 until the license is finally issued that process and the

1 issues related to that process are still available for
2 review.

3 Mr. Nelson: Okay.

4 Mr. Fred Nelson: That doesn't go to the
5 issue of whether there is adequate proffer of evidence.

6 Mr. Nelson: Okay. Any more questions or
7 comment?

8 Okay. So we'll vote on the motion.

9 Karen.

10 Ms. Langley: Aye.

11 Mr. Nelson: Greg.

12 Mr. Oman: Yes.

13 Mr. Nelson: Gary.

14 Mr. Edwards: No.

15 Mr. Nelson: No.

16 Dianne.

17 Ms. Nielson: No.

18 Mr. Nelson: Barbara.

19 Ms. Reid: Yes.

20 Mr. Nelson: Kent.

21 Mr. Bradford: Yes.

22 Mr. Nelson: Tom.

23 Mr. Chism: No.

24 Mr. Nelson: Rod.

25 Mr. Julander: No.

1 Mr. Nelson: Teryl.

2 Mr. Hunsaker: Puts me in quite a situation.
3 I am dedicated to the Tooele County Response Team. I
4 believe we have the best emergency management trained team
5 in the state of Utah. I need to defend them but I think
6 I -- I think I have some questions in my mind as to the
7 plan. I would like to see the plan. And so I think I would
8 have to vote no.

9 Mr. Nelson: Okay. So Roman numeral two --
10 Roman numeral two remains an item for the administrative
11 hearing then. The Motion for Summary Judgment on this issue
12 has been denied.

13 (Recess taken.)

14 All right. Let's resume.

15 Roman numeral three in the request for
16 summary judgment. Mr. Holtkamp.

17 Mr. Holtkamp: The little question that I
18 asked wasn't trying to be snippy or snide, but if the board
19 would like me to read what's in the brief, I'll do that. I
20 am not sure -- I mean, Jason did that and I didn't.

21 Mr. Nelson: This board member would prefer a
22 succinct summary of the issue.

23 Mr. Holtkamp: Okay.

24 Ms. Langley: Also.

25 Mr. Bradford: I think that was part of the

1 motion, a brief from all of those who were speaking.

2 Mr. Holtkamp: Well, there are briefs which
3 are written which are really long and briefs which are
4 spoken which are really short.

5 Roman numeral three in our response is the
6 land ownership issue. And just to hit the high points of
7 why we believe that this should be disposed of on summary
8 judgment.

9 Number one, it is purely a legal issue that
10 FAIR has raised. We believe that the land ownership issue,
11 the exemption, was decided by the board and the record is
12 complete and the decision was consistent with the law.

13 We believe the Nuclear Regulatory Commission,
14 when it was asked to look at the exemption available for
15 land ownership, basically upholds the state's authority to
16 do so.

17 We think that this is a very, very late --
18 too late attempt to ask the board to reconsider the issue.

19 The complaint that FAIR makes is that the
20 record is not sufficient but, there again, there are no
21 controverted facts at issue, there is no proffer, no
22 affidavit, nothing to indicate that -- the fact that the
23 board considered at the time that there is something in
24 dispute with regard to those facts.

25 We should point out that notwithstanding the

1 claims that FAIR has made, they have ample opportunity to be
2 heard during the land ownership hearings. There were a
3 number of them. Many of them lasted a long time and there
4 were lots and lots of people who spoke, including many from
5 FAIR, including Mr. Groenewold.

6 There is one complaint in FAIR's submittal
7 that because the representative of Envirocare was the last
8 person to make a comment at some time that somehow their due
9 process rights were compromised because they couldn't rebut
10 them. I would simply point out, number one, it was a
11 request that this individual clarify something and, number
12 two, if that were the standard, we would still be in hearing
13 today because each one of us who spoke last, the other party
14 would claim that his or her rights were violated if we
15 didn't get the next word.

16 The board was presented with a very
17 comprehensive report on the comments. The comments are a
18 matter of public record. So everything is in on the land
19 ownership issue. We just don't believe there is any need at
20 all to reconsider it nor is there a legal requirement to
21 reconsider it at this time.

22 Mr. Nelson: Jason.

23 Mr. Groenewold: I think a couple of things.
24 This is a very important issue. One on the timing. To
25 resolve that simply wouldn't have taken effect until the

1 Executive Secretary issued his license. In fact, that was
2 one of the conditions that the board placed on the land use
3 exemption. So very much we were timely in waiting until
4 that decision had been made before challenging the exemption
5 to the rule for land ownership.

6 It's also noted that when the Executive
7 Secretary issued the license under the site location on page
8 3 of 18 it says, pursuant to Utah Annotated code
9 R313-12-55(1) the licensee is granted an exemption to Utah
10 Annotated Code R313-25-9 as it relates to land ownership and
11 assumption of ownership.

12 So that's when the Executive Secretary also
13 acted on that particular requirement, granting an exemption
14 to both the state rules and Federal rules that required that
15 land be owned either by a state or Federal government and
16 not by a private entity.

17 I think what's important for the board to
18 consider -- the second part of this -- is whether or not it
19 was appropriate to grant such an exemption.

20 In the letter that the NRC sent to Bill
21 Sinclair where the Executive Secretary had asked the NRC to
22 advise whether or not an exemption to the land ownership
23 should be granted. That letter was received by Bill
24 Sinclair the -- one day before the board meeting and in it
25 the NRC quite clearly said that the previous exemption

1 rationale applicable to class A waste and
2 naturally-occurring radioactive materials needs to be
3 thoroughly examined by Utah for applicability to class B and
4 C waste. The review should include a determination whether
5 the bases for the previous exemption from the land ownership
6 requirements continue to apply to the disposal of class B
7 and C waste.

8 The letter went on to say that additional
9 waste form and facility design requirements are placed on
10 class B and C waste and long-term institutional land control
11 through government ownership take on added importance.
12 Specifically, class B and C waste is significantly more
13 hazardous than class A waste and requires greater assurance
14 that intruders will not be exposed to the radioactive
15 material that the facility contains. Reliable long-term
16 control and protection is an essential consideration in
17 finding reasonable assurance that the public will be
18 protected from the hazards associated with class B and C
19 waste.

20 For Envirocare to say the 1995 case in which
21 the NRC heard from US Ecology asking that the state of
22 Utah's authority to regulate low-level radioactive waste be
23 revoked, that that was then a broad approval to grant an
24 exemption at any time, does not reflect what the NRC's
25 advice to the Executive Secretary or the Utah Radiation --

1 Division of Radiation Control is.

2 And I think the reason that that's important
3 is because when the NRC was deliberating last time, they did
4 take into consideration the nature of the waste and the
5 assurances that the state had given for matching long-term
6 institutional control and some of the bonding issues.

7 Now that we get into a higher level of waste,
8 that picture changes dramatically. If -- a couple of
9 studies that were added to the record that were never
10 presented to this board when considering on whether or not
11 to grant a land exemption is that the NRC states -- well,
12 I'll come to the reports, but I want to finish up on the
13 letter first.

14 The NRC stated in their letter that
15 government ownership is one of these controls that act as a
16 system for protection of public health and safety, meaning
17 that's a key. The NRC found that without Federal or state
18 government land ownership there is, as a general matter, no
19 Federal guarantee of a responsible organization with legal
20 obligation to clean up potential unanticipated contamination
21 if a private company is no longer in business.

22 That's exactly what we are dealing with when
23 we are talking about Envirocare. We are talking about
24 trying to isolate these wastes for at least 500 years, if
25 not more, and there -- not only has our country not been --

1 had a constitution for that length of time, but there is no
2 corporation that has been able to sustain operations for
3 that length of time.

4 When the Department of Energy looked at the
5 issue of being able to contain waste and ensure that there
6 is adequate protection they said in -- or they had a
7 long-term institutional management of -- excuse me. Let me
8 back up.

9 In June of 2000 the National Academy of
10 Sciences issued a report called Long-term Institutional
11 Management of US Department of Energy Legacy Waste Sites in
12 which they stated there is no convincing evidence that
13 institutional controls and other stewardship measures are
14 reliable over the long term. Any steps that might lessen
15 the effectiveness of these controls would exacerbate the
16 situation, meaning they find it very questionable if even
17 our Federal government has the capacity to ensure adequate
18 protection for radioactive waste contaminated sites that the
19 DOE has been dealing with. And for us to further undermine
20 that by saying, we are going to grant exemptions and not
21 require, you know, Federal or state ownership of these
22 lands, you know, is exacerbating that situation.

23 One of the things that the board did is they
24 conditioned approval of the land use exemption on approval
25 by the legislature of an agreement to take over

1 responsibility for the Envirocare site. Jim Gowans has
2 actually introduced a bill that would have done just that
3 and that bill never passed. So one of the conditions that
4 the board asked to be met never, in fact, happened, even
5 though it was something that was considered -- you know,
6 made it through committee but was never passed by the house.

7 You know, the Nuclear Regulatory Commission
8 did a similar report called Long-term Stewardship and the
9 Nuclear Weapons Complex, The Challenges Ahead, in which it
10 states, another, and perhaps more effective, form of
11 institutional control available for Federal facilities, more
12 effective than Department of Energy implementing mechanisms
13 that inform any renters or purchasers of DOE land and
14 facilities of the hazards involved, is continued Federal
15 government ownership and control.

16 Now, the reason that we point that out and
17 supplemented that into the record is because one of the
18 claims that Envirocare has made is that they have
19 restrictions, deed restrictions, on the land itself that
20 would prevent anyone from developing the site into the
21 future.

22 Well, according to this report, what they
23 found is it's best to have a government agency or an entity
24 have ownership of that site.

25 We do not have that with this facility and to

1 grant an exemption to that puts a -- potentially the public
2 at risk. And that's something that the board had to
3 consider, and the Executive Secretary as well, before
4 granting that exemption, is public health adequately
5 protected. If not -- you know, or is this otherwise in the
6 public interest. If not, then the exemption should not be
7 granted.

8 So I think for the reasons of the conditions
9 that were placed on that approval not having been met, that
10 the situation is exacerbated by not having assurances of who
11 is going to be responsible for the site into the future are
12 reasons why this decision should not be granted for Motion
13 for Summary Judgment.

14 There are clearly issues in dispute as to
15 whether or not that land use exemption was properly granted,
16 whether it is adequate, and certainly we feel that we have
17 filed the challenge to that in a timely manner.

18 Mr. Nelson: Questions for Jason?

19 Mr. Julander: I have a question for our
20 attorney.

21 Mr. Nelson: Okay.

22 Ms. Lockhart: Let me make a quick comment
23 first.

24 I would just like to say that the Executive
25 Secretary supports the Motion for Summary Judgment on this

1 Section 3. We believe that there is authority for the board
2 to adopt an exemption to the land disposal -- to the land
3 use requirements -- I'm sorry, land ownership requirements
4 and that the conditions imposed by the board were reasonable
5 and appropriate and it answers the question of state
6 ownership because there is a condition --

7 Mr. Julander: Would you speak up just a bit?

8 Ms. Lockhart: Sure.

9 It answers the question of the state
10 ownership because there is a condition, the license
11 incorporates that condition. There will be no B and C waste
12 facility if that condition isn't complete. If it continues
13 to fail in the legislature, that will be the answer.

14 Mr. Julander: That was my question.

15 Mr. Nelson: Anything from you, Fred?

16 Mr. Fred Nelson: Just that this is different
17 from the previous issue and that the board has heard this
18 issue. This is not a new issue. It was carefully reviewed
19 by the board. And so the question is more in the context of
20 does the board want to reopen this issue and look at it
21 again or do you want to just stay with the original
22 decision.

23 The only issue, in my mind, that is at all in
24 question on this, is whether or not the Executive Secretary
25 properly implemented what you decided, whether the

1 conditions were appropriately put in the license, and I
2 don't think there has been any issue raised with respect to
3 that.

4 Mr. Nelson: Okay.

5 Mr. Groenewold: Can I just have a quick
6 follow-up?

7 You know, I think one of the things we are
8 asking in the context of our appeal is that this be a basis
9 for denying the license. And to the extent that this issue
10 was not passed by the legislature, and in the NRC letter to
11 Bill Sinclair they said, you know, we proposed -- we
12 understand that the proposed state legislation was designed
13 for transfer of ownership of the site to the Federal or
14 state government at the end of the hundred-year
15 institutional control period. However, it is our
16 understanding that this proposed legislation has been
17 withdrawn and, therefore, will not be addressed by the
18 state legislature until perhaps the spring of 2002. We
19 would consider it appropriate to await passage of this
20 legislation and assurance of assumption of government
21 ownership at the end of the hundred years before granting
22 this exemption.

23 You know, that was something that was not
24 presented to this board when the original exemption was
25 first voted on. And I think what's critical is that we

1 still haven't seen that legislation. You know, how much
2 longer are we going to wait? Are we going to wait five, ten
3 years for that to happen?

4 I think what's best is to go ahead and deny
5 this request for summary judgment and then allow that issue
6 to also come forward, you know, in a hearing, because I
7 think there is a questionable doubt as to whether or not
8 that land ownership exemption is -- was reasonable or should
9 have been granted.

10 Mr. Nelson: Greg.

11 Mr. Oman: It seems like we have got a dog
12 chasing its tail here because the -- the board considered
13 this quite carefully and the check that we put in our
14 decision was that if the legislature approves it, then that
15 license will be granted.

16 Isn't that correct, Fred?

17 Mr. Fred Nelson: Yes.

18 Mr. Oman: Okay. So what we have basically
19 done, then, is we have, in our mind, we have done what
20 you've has asked us to do, just found a different way to do
21 it. We have approved this exemption but it's conditional.
22 If the legislature doesn't approve it, then that part of the
23 license will be revoked. Is that right? Did I understand
24 that correctly?

25 Okay. That helps me understand what's going

1 on.

2 Mr. Nelson: Dianne.

3 Ms. Nielson: Mr. Chairman, I think also the
4 consideration of the timeliness of the appeal; if we were to
5 accept that argument it would mean that this issue could be
6 appealed again at the time that the legislature made the
7 decision because that would be another condition that would
8 have been acted on.

9 I think the action of the board was clear. I
10 think the considerations were clear and the records showed
11 that and the conditions were self-actuated and I -- we did
12 not put a date on the condition, that the legislature had to
13 act by a certain time. I think the order was clear and that
14 there isn't a basis in -- either in technical merit or
15 actually in timeliness of the issue at this point.

16 Mr. Groenewold: Can I just add one thing to
17 that then? You know, the license itself -- I'll retract my
18 statement.

19 Mr. Nelson: Anything else? Okay. Let's go
20 around, then, and vote on Roman numeral number three in
21 terms of summary judgment, granting summary judgment.

22 Karen.

23 Ms. Langley: So -- I want to just make sure
24 I understand. I want to refresh my memory again. When I
25 say aye, that is in favor of the summary judgment.

1 Mr. Nelson: That is in favor of the summary
2 judgment.
3 Ms. Langley: Aye.
4 Mr. Nelson: Greg.
5 Mr. Oman: Yes.
6 Mr. Nelson: Karen again.
7 Ms. Langley: Yes.
8 Mr. Nelson: Gary.
9 Mr. Edwards: Yes.
10 Ms. Nielson: Yes.
11 Mr. Nelson: And I have a no.
12 Ms. Nielson: Oh, I'm sorry.
13 Mr. Nelson: That's okay.
14 Barbara.
15 Ms. Reid: Yes.
16 Mr. Nelson: Kent.
17 Mr. Bradford: Yes.
18 Mr. Nelson: Tom.
19 Mr. Bradford: Yes.
20 Mr. Nelson: Rod.
21 Mr. Julander: Yes.
22 Mr. Nelson: Teryl.
23 Mr. Hunsaker: Yes.
24 Mr. Nelson: Okay, Roman numeral number four.
25 Mr. Holtkamp: This issue has to do with

1 FAIR's claim that the containerized class A waste was
2 improperly included in the license, and it appears to be
3 based on an argument that the land ownership exemption does
4 not extend to containerized class A waste.

5 As we point out in the brief, there were two
6 exemptions that were issued, one in 1991, which covered
7 low-level radioactive waste. The reason for the second
8 exemption was that the Executive Secretary felt that B and C
9 waste had different characteristics, required longer
10 consideration for post-closure and institutional care and so
11 forth. And containerized class A waste falls easily within
12 the considerations that were addressed by the board with
13 regard to containerize -- or with regard to B and C waste.

14 This is purely a legal issue and on the legal
15 issue we believe that the inclusion of containerized A waste
16 in the license was supported by the record, it's consistent
17 with the land ownership exemption and so, therefore, we
18 don't think there is any reason for going forward with an
19 evidentiary hearing on it.

20 Mr. Nelson: Jason.

21 Ms. Lockhart: Excuse me. I think probably I
22 need to make a statement and then Jason can have an
23 opportunity to respond, which won't be too difficult since
24 all I am going to do is say --

25 Ms. Nielson: A little louder.

1 Ms. Lockhart: The Executive Secretary
2 supports the Motion for Summary Judgment on this issue and
3 doesn't have anything to add to what Envirocare has stated.

4 Mr. Nelson: Okay. Jason.

5 Mr. Groenewold: Yeah. I think one of the
6 things to consider is that when that -- at the time that
7 that license was issued or -- excuse me. At the time that
8 the exemption was issued, what did the license condition
9 itself say, you know, and it only applied to the waste that
10 Envirocare had currently accepted back in 1991.

11 When we are talking about coming to a new
12 part of the process, where Envirocare is seeking permission
13 to accept new forms of waste, either they need to get the
14 assurances of long-term institutional control by having the
15 state agree to the ownership or they have to get a similar
16 exemption, and they didn't do that for containerized class A
17 waste.

18 And I think just by looking at them seeking
19 approval for class B and C waste indicates an
20 acknowledgement on their part that, in fact, there is a
21 distinction that that exemption only applied to certain
22 amounts -- or certain types of waste. And so, as it
23 currently stands, they were not granted an exemption of the
24 land ownership requirements for containerized A waste, so we
25 don't believe that the board should grant a Motion for

1 Summary Judgment on this point.

2 Mr. Nelson: Okay.

3 Fred, do you have anything to add?

4 Mr. Fred Nelson: Well, only just to clarify

5 that when the land ownership exemption was brought to the

6 board for the B and C waste, it was indicated to the board

7 that it was the position of the Executive Secretary at that

8 time, and continues to be the position of the Executive

9 Secretary, that the A waste exemption had been granted in

10 1991. The board did consider that question of the scope, as

11 I recall, when they made the decision on the B and C waste

12 and that was a question because the license did include

13 containerized A, but it was discussed at that time, so it

14 was an issue that was part of, I think, the discussion that

15 you had before.

16 Mr. Nelson: Okay. Questions or comments?

17 All right. Vote then on the Motion for

18 Summary Judgment.

19 Karen.

20 Ms. Langley: Aye.

21 Mr. Nelson: Greg.

22 Mr. Oman: Yes.

23 Mr. Nelson: Gary.

24 Mr. Edwards: Yes.

25 Mr. Nelson: Yes.

1 Dianne.
2 Ms. Nielson: Yes.
3 Mr. Nelson: Barbara.
4 Ms. Reid: Yes.
5 Mr. Nelson: Kent.
6 Mr. Bradford: Yes.
7 Mr. Nelson: Tom.
8 Mr. Chism: Yes.
9 Mr. Nelson: Rod.
10 Mr. Julander: Yes.
11 Mr. Nelson: Teryl.
12 Mr. Hunsaker: Yes.
13 All right. Roman numeral number five.
14 Mr. Holtkamp.
15 Mr. Holtkamp: The allegation -- or the claim
16 that FAIR makes here that we are responding to in number
17 five is that a condition that was imposed by the board
18 having to do with generator site access requirements was not
19 met. And, as we point out in our brief, this is
20 inconsistent with the actual facts.
21 The division -- the board promulgated the
22 state generator site access requirements which became
23 effective on June 8, 2001, before the license was issued on
24 July 9, 2001. And, again, to the extent there is an issue,
25 it is absolutely and purely legal. And, besides that, we

1 think that there is no issue as to whether or not a
2 condition was fulfilled because site access rules were
3 promulgated and they are still in effect today.

4 Mr. Nelson: Yes.

5 Ms. Lockhart: The Executive Secretary also
6 supports summary judgment on this. The -- as Mr. Holtkamp
7 suggested, there was a program in place. There was one
8 aspect of the program that was not deemed formed at that
9 time, and I guess it would be enforcement. An enforcement
10 date I believe of the 30th of December was established, so
11 that time has now passed.

12 And I will remind the board again that this
13 is a de novo proceeding and there is -- you certainly have
14 the ability to take judicial notice of programs that you are
15 aware of.

16 Mr. Nelson: Jason.

17 Mr. Groenewold: You know, at the time this
18 was filed it is important to note that the site access
19 program was not in place and one of the conditions that was
20 required is that there be adequate funding to ensure that
21 this program could, in fact, take place. And I think one of
22 the things that would be good to bring forward in the
23 evidentiary hearing is whether or not this program was in
24 place at the time that the Executive Secretary issued its
25 license, because it did not, in fact, condition it on that

1 requirement.

2 And then the second thing would be, you know,
3 is that program, in fact, up and running and working to
4 properly ensure that anyone who is shipping waste to this
5 site -- or to the Envirocare facility, you know, is actually
6 representing their material product correctly.

7 So the -- again, the condition that was
8 required of the Executive Secretary and passed in the board
9 minutes of January 19 of 2001 stated that there be a
10 generator site access program in place with the necessary
11 authorities for funding the program, and that had not
12 occurred when the license was issued.

13 Mr. Nelson: Okay. Mr. Nelson.

14 Mr. Fred Nelson: No comments.

15 Mr. Nelson: No comments.

16 Any questions for anyone?

17 So what is it, Jason, that you felt wasn't in
18 place in a timely fashion? Can you be specific?

19 Mr. Groenewold: Whether or not -- I mean --
20 more specifically, I mean at the time that this was drafted,
21 you know, it was whether or not the generator site access
22 program was in place, you know, more than just conceptually
23 in a rule, you know, was the staff in place, was the funding
24 in place to ensure the success of such a program, and we do
25 not feel that it was.

1 Mr. Nelson: Do you contend that such a
2 program is not now in place?

3 Mr. Groenewold: You know, unfortunately, I
4 am not able to respond to that entirely at this point.

5 Mr. Nelson: Okay. Any more questions or
6 comments?

7 Mr. Julander: Can Envirocare respond to
8 that?

9 Mr. Holtkamp: It is in place and the
10 Executive Secretary has undertaken enforcement actions, has
11 continued to do so against generators. Generators have been
12 paying fees for permit -- site access permits. As far as we
13 know, it's up and rolling. But I can't speak directly for
14 the Executive Secretary, only for Envirocare.

15 Ms. Lockhart: I can. It is in place and
16 working.

17 Mr. Nelson: Any more questions or
18 discussion?

19 Okay. On Roman numeral number five then.
20 Karen.

21 Ms. Langley: Aye.

22 Mr. Nelson: Greg.

23 Mr. Oman: Aye.

24 Mr. Nelson: Gary.

25 Mr. Edwards: Yes.

1 Mr. Nelson: Yes.
2 Dianne.
3 Ms. Nielson: Yes.
4 Mr. Nelson: Barbara.
5 Ms. Reid: Yes.
6 Mr. Nelson: Kent.
7 Mr. Bradford: Yes.
8 Mr. Nelson: Tom.
9 Mr. Chism: Yes.
10 Mr. Nelson: Rod.
11 Mr. Julander: Yes.
12 Mr. Nelson: Teryl.
13 Mr. Hunsaker: Yes.
14 Okay. Motion for Summary Judgment on Roman
15 numeral five has been granted.
16 Roman numeral number six.
17 Mr. Holtkamp: We are two thirds of the way
18 home. Six out of nine.
19 This issue has to do with the claim that in
20 approving the license the board violated a rule which
21 requires the applicants to submit certain evidence by
22 assumption of ownership. That's Utah Administrative
23 R313-25(9)(2). This is related to the issue we talked about
24 regarding to land ownership.
25 The license was granted contingent upon the

1 arrangements being made for the state to assume ownership of
2 the site at the appropriate point and we don't think that --
3 certainly there is no factual issue here. This is, at best,
4 a legal issue and we do not think that the license condition
5 either was improperly granted or somehow has been violated
6 and certainly there is no cause to question the Executive
7 Secretary's determination on this point.

8 Mr. Nelson: Okay. Does counsel for the
9 Executive Secretary have something to say?

10 Ms. Lockhart: Yeah. We support the Motion
11 for Summary Judgment on this. We believe that the
12 conditions in the license and in the ownership -- land
13 ownership exemption are sufficient to provide evidence that
14 arrangements have been made for assumption of ownership.

15 Mr. Nelson: Okay. Jason.

16 Mr. Groenewold: Well, I think simply, again,
17 that what the rule requires is that this evidence be in
18 place, that if a proposed disposal site is on land not owned
19 by the Federal or state government that arrangements have
20 been made for assumption of ownership and fee by the Federal
21 or state agency.

22 We have not seen the legislature act on this.
23 We don't have those assurances in place, that anyone is
24 going to take over ownership of this site. You know, by
25 default we don't know who is going to be responsible for the

1 waste that Envirocare brings to this particular site. And
2 our argument is that that condition needed to be met prior
3 to the issuance of the license and it wasn't met and,
4 therefore, the Executive Secretary should not have waived
5 those requirements that somehow put in place an agreement
6 either with the state or with the Federal government as to
7 how this facility or this site is going to be cared for in
8 the long term.

9 And, you know, kind of bringing in again some
10 of the issues that I raised before about why that is such an
11 important part of this process of disposing of low-level
12 radioactive waste. It's critical and it's key, and to just
13 tacitly grant an exemption to those requirements compromises
14 the safety for the citizens in the long term and so,
15 therefore, you know, the Executive Secretary should not have
16 granted this license until those assurances had been met.
17 And that's something that we think that this board should,
18 you know, go back and look at as well, is whether or not
19 those conditions are in place and who is, in fact, going to
20 be responsible before Envirocare starts accepting this
21 waste.

22 Mr. Nelson: Okay. Yes.

23 Mr. Oman: Just for clarification,
24 Mr. Chairman.

25 Unless the legislature approves assumption of

1 this land, Envirocare cannot use its license to accept B and
2 C waste. Is that correct?

3 Mr. Fred Nelson: That's correct.

4 Mr. Nelson: Yes, that's correct.

5 Any more questions?

6 Mr. Nelson, you have a comment?

7 Mr. Fred Nelson: No.

8 Mr. Nelson: I have a question for you.

9 Do you have any -- if you can comment on it.

10 If I assume here that Envirocare is properly citing the
11 requirement that the arrangements have been made for
12 assumption are we -- is there, in fact, potential for a
13 legitimate disagreement in terms of a point of law when, in
14 fact, the condition is not in place? I read it and it
15 certainly seems to say that it has been made.

16 Mr. Fred Nelson: You have a few separate
17 provisions of the rule. You have the rule that specifically
18 references that and then you have the other section of the
19 rule which allows for granting the exemption. So it would
20 appear to me you need to read the two together and when the
21 board made the decision that they would grant the exemption
22 subject to conditions you are back to the issue that was
23 raised before.

24 Mr. Nelson: That is the -- that, in fact,
25 can be construed as the arrangement?

1 Mr. Fred Nelson: Right.

2 Mr. Nelson: All right. Thanks. I needed to

3 clarify that.

4 Any more questions or comments on this?

5 Mr. Groenewold: I mean, isn't the fact that

6 they are making assertions that they are in place something

7 that's now being disputed and, therefore, would be grounds

8 for denying that motion? I mean, if that factual issue is

9 in dispute, then by the rules governing motions for summary

10 judgment the board cannot grant Envirocare a Motion for

11 Summary Judgment if that's in dispute.

12 Mr. Holtkamp: That's a legal issue. There

13 are no facts in dispute here.

14 Mr. Groenewold: About whether or not the

15 land ownership agreements are in place?

16 Ms. Lockhart: It's the application of the

17 facts to the law. We are all agreeing on the facts.

18 Mr. Holtkamp: Yeah. We are not disputing

19 any fact.

20 Mr. Groenewold: So you are saying that you

21 agree that those conditions are not in place?

22 Mr. Holtkamp: I am suggesting that -- the

23 condition as appropriate and it's legal and...

24 Mr. Nelson: Would it be fair to say,

25 Mr. Nelson, that the -- it's up to the board members to

1 decide whether or not the exemption constitutes the
2 arrangement?
3 Mr. Fred Nelson: Yes.
4 Mr. Nelson: Whether or not that satisfies
5 that?
6 Mr. Fred Nelson: Yes.
7 Mr. Holtkamp: Which the board has already
8 decided that, I believe, essentially.
9 Mr. Nelson: All right. Any more questions
10 or comments?
11 Okay. Let's go through.
12 Karen.
13 Ms. Langley: Aye.
14 Mr. Nelson: Greg.
15 Mr. Oman: Aye.
16 Mr. Nelson: Gary.
17 Mr. Edwards: Yes.
18 Mr. Nelson: No.
19 Dianne.
20 Ms. Nielson: Yes.
21 Mr. Nelson: Barbara.
22 Ms. Reid: Yes.
23 Mr. Nelson: Kent.
24 Mr. Bradford: Yes.
25 Mr. Nelson: Tom.

1 Mr. Chism: Yes.
2 Mr. Nelson: Rod.
3 Mr. Julander: Yes.
4 Mr. Nelson: Teryl.
5 Mr. Hunsaker: Yes.
6 That motion to -- for summary judgment on
7 Roman numeral six has been granted.
8 Mr. Holtkamp: Number seven.
9 Mr. Nelson: I am going to need a couple more
10 before we are done. Okay. But I think we can get started.
11 Mr. Holtkamp.
12 Mr. Holtkamp: Oh. We okay?
13 Mr. Nelson: I think we are okay, yeah.
14 Mr. Holtkamp: All right. Number seven.
15 FAIR argues that the Executive Secretary
16 should not have issued the license with the condition of
17 making the license contingent upon the approval of the
18 legislation by the governor and I think that all that needs
19 to be said about this is that that's exactly what the
20 statute says. This license is not -- Envirocare cannot
21 accept class B and C waste unless and until after the
22 license is issued and approved. The legislature and the
23 governor both approve it. That's in the law and it's clear
24 and I frankly am not sure of the basis for arguing that
25 somehow reflecting that as a license condition is not

1 consistent with the law or is illegal or it's somehow
2 inappropriate. At best, again, this is a legal issue. We
3 don't have any factual issue here, obviously, and it's --
4 the clear language of the statute speaks for itself.

5 Mr. Nelson: Okay. Counsel for the Executive
6 Secretary?

7 Ms. Lockhart: The Executive Secretary
8 supports the Motion for Summary Judgment. I am not aware of
9 any law, statute, case law or otherwise, that suggests that
10 the conditions are not appropriate in this situation and
11 FAIR has not brought any of that law to our attention.

12 Mr. Nelson: Okay. Jason.

13 Mr. Groenewold: Well, in fact, the NRC does
14 have provisions on which they say only the conditions can be
15 placed on a license in order to either promote the common
16 defense and security, protect health or to minimize danger
17 to life or property or, finally, require reports and the
18 keeping of records and to provide for inspections and
19 activities under the license that may be necessary or
20 appropriate to effectuate the purposes of the act and
21 regulations thereunder.

22 What this really gets into is a separation of
23 powers and what the board is doing and what the Executive
24 Secretary has done is conditioned this license on the action
25 to be taken by others. And the NRC is saying that's not

1 appropriate. That's why they, in their letter, said, wait
2 for the passage of the legislation before you grant the
3 exemption. You know, waiting for these requirements to be
4 put in place where you have adequate funding to ensure that,
5 in fact, the division staff have the capacity in order to
6 regulate these types of facilities.

7 I think this year is a perfect example in an
8 era of budget cuts where all of a sudden the state program
9 could be jeopardized and its funding cut in order to balance
10 the budget.

11 You know, what the Executive Secretary has
12 done is issued a license that requires third parties to act
13 and the Executive Secretary has no control over their
14 actions. And I think what our argument here is saying is
15 that that's violating the separation of powers where its
16 appropriate to let the legislative body act how it needs to
17 and conduct its business and put those matters in place that
18 are requirements of this license and conditions that
19 Envirocare must have put in place before that license is
20 granted. And without those assurances, you know, the
21 Executive Secretary and this board starts to assume powers
22 that are better left for the legislature.

23 And so, therefore, what Envirocare is arguing
24 misinterprets completely the basis for our argument. They
25 still have yet to address that. You know, we are not

1 denying that the process for final approval on a license is,
2 you know, the Executive Secretary issue their decision, then
3 the legislature and the governor, but when the conditions of
4 the license itself require actions of a third party, that
5 violates the separation of those powers and the Executive
6 Secretary should not assume that authority, or this board,
7 powers that are better left to the legislature or conditions
8 that need to be met by third parties that have not yet been
9 met.

10 So, again, we feel that this motion should be
11 denied and that the license should have been denied until --
12 or not issued until those conditions had been met by the
13 third parties.

14 Mr. Nelson: Okay. Questions or comments?

15 Mr. Nelson.

16 Mr. Fred Nelson: Just a comment for the
17 record, and that is the Utah Code Annotated 19-3-105
18 specifically provides for the sequence of when the
19 legislature will act and they task the Executive Secretary
20 and the board with issuing a license and making the findings
21 prior to it being submitted to them for approval. And so
22 you can't wait to issue the license until the subsequent
23 actions are taken. The legislature require that you act
24 initially.

25 Mr. Groenewold: If I may just follow up on

1 that point.

2 Again, let's not confuse the final approval
3 of the license with conditions in the license itself. You
4 know, the NRC -- the reason why they have under 10 CFR
5 Section 61.24 very specific reasons or conditions -- very
6 specific criteria for placing conditions on a license. None
7 of those were met when the Executive Secretary issued this
8 license. You know, placing conditions on adequate funding
9 or, you know, having the site generator access program in
10 place or ownership by the state legislature agreeing to take
11 over the site, there was no reason why that couldn't wait
12 until the legislature passed legislation and make those
13 agreements and those commitments before this license was
14 issued. So what we are arguing is that the Executive
15 Secretary most appropriately should have waited for the
16 legislature to take those actions before they issued a
17 license.

18 Mr. Nelson: I have a question for you.

19 You say that there is no provision in the
20 Utah administrative code nor in the license for determining
21 when these, meaning the license conditions, must be met.
22 Nor is there any provision for identifying the individual or
23 body responsible for making those determinations.

24 Could you elaborate on the point you are
25 trying to make here?

1 Mr. Groenewold: Well, I think for the -- you
2 know, obviously with either the -- is it the legislature and
3 the state of Utah that's going to be responsible for the
4 land ownership agreement or is the Federal government? You
5 know, which body in itself is going to be responsible for
6 taking over that waste and the site where Envirocare is
7 planning to place this waste.

8 Mr. Holtkamp: I thought we were talking
9 about legislature and gubernatorial approval of the license.

10 Mr. Nelson: What I thought I was reading,
11 when I read this last night, was that -- that the -- that
12 presumably this board is going to have to take an action to
13 determine that the actions taken -- hypothetical actions
14 taken by the -- that may or may not take place, but assuming
15 they are taken by the legislature, that they are adequate
16 and consistent with the intent of the conditions.

17 Does that make sense to anyone?

18 Dianne.

19 Ms. Nielson: Mr. Chairman, let me see if I
20 can state my understanding and find out whether it is.

21 My understanding is that the issue before us
22 right now is the order issue and whether there are concerns
23 about the legislature and the governor acting relative to
24 the timing of the agency -- the Executive Secretary's
25 action. But with regard to the question that you just

1 asked, I think what the board did was pass a land ownership
2 exemption which -- which conditioned -- in which there were
3 conditions, and that if those conditions were met the land
4 ownership exemption was self-affectuating or activating and
5 that if those conditions were not met, then it was not, but
6 I don't believe we took anything in that action on land
7 ownership exemption that said that the issue needed to come
8 back before the board at some future point.

9 Mr. Nelson: I think that's in the minutes.

10 Mr. Fred Nelson: It -- the question I think
11 that the chair raises, that you have raised before, and that
12 is at some point in time somebody is going to need to make a
13 determination that, in fact, what the legislature did was
14 consistent with what the board approved.

15 Ms. Nielson: I see what you are asking.

16 Okay.

17 Mr. Fred Nelson: And on that issue it -- on
18 the board's own initiative they can review that issue
19 because you have granted the exemption and you could review
20 the issue as to whether or not what the legislature did met
21 the requirements of the exemption granted.

22 Ms. Nielson: I understand your question
23 then. Thank you.

24 Mr. Nelson: Well, it seems to me like the
25 board is going to have to do that, otherwise -- I don't know

1 how we can assume that if the legislature acts that it has
2 acted appropriately by default.

3 Mr. Holtkamp: I think we would agree with
4 that, Mr. Chairman.

5 Mr. Hunsaker: Fred, if I understand it, if
6 we do nothing, we make no decision, the legislature makes no
7 decision. In other words, if I understand the scenario of
8 the west desert when it was started, the first requirement
9 was for the county to give a conditional use permit, next --
10 and I wasn't around -- on the assumption it would come
11 before the Radiation Control Board, then it went to the
12 state for approval, to the state legislature. The state
13 legislature will not and would not act on it till all the
14 bodies below acted on it.

15 Mr. Fred Nelson: There is two separate
16 jurisdictions here. The board has the authority to grant
17 the exemption and condition it a certain way. The
18 legislature is going to act. If they act differently than
19 what the board conditioned, the board has the ability to
20 say, wait a minute, exemption no longer exists because the
21 legislature didn't do what we authorized. And that's
22 appropriate.

23 Mr. Holtkamp: And certainly once the
24 legislature acts, I am sure that we would then immediately
25 request that the board make a determination that the

1 condition is fulfilled, so we wouldn't wait for the board to
2 act on its own, I think we would initiate that I'm sure.

3 Mr. Nelson: Okay.

4 Mr. Julander: Jason, does that satisfy this
5 problem? Is there a problem beyond that?

6 Mr. Groenewold: I think the issue that we
7 were concerned about and raised and are asking for
8 reconsideration is if this -- if this body is assuming
9 powers that have not been delegated to it by the legislature
10 explicitly. I think when we are talking about land
11 ownership issues and granting exemptions that what's most
12 appropriate is to wait for the legislature to act on that
13 first. You know, obviously your granting the exemption
14 before seems to indicate that you don't buy that same
15 argument that there is a reason to separate powers between
16 administrative bodies and legislative bodies, and that's
17 something that we feel is very for important, to make sure
18 that there is a distinction. We see no reason why this
19 process -- you know, if it's necessary that those
20 requirements be put in place, why that not be done first, on
21 the very front end. There is no reason why those bills
22 couldn't have been introduced and voted on by the
23 legislature.

24 Mr. Julander: In what way is this -- does
25 this go beyond a legal question?

1 Mr. Groenewold: I mean, I think the issue
2 that we are contesting is whether or not -- you know, the
3 Executive Secretary has the ability to condition its license
4 on the actions of a third party. And maybe that is a legal
5 issue that's before this board, but we would disagree with
6 Envirocare that they are in the right on this. So we feel
7 that the board should deny this request for summary judgment
8 and, in fact, find that the license should not have been
9 issued conditioned upon actions to be taken by others.

10 Mr. Hunsaker: Fred, do you feel like the
11 board is in violation of the law in any way, shape or form?
12 I mean, that's a loaded question.

13 Mr. Fred Nelson: No. If I did, I would
14 immediately try and talk to you about it.

15 Mr. Hunsaker: But is the Executive Secretary
16 overstepping his bounds of authority as given to him by the
17 state legislature?

18 Mr. Fred Nelson: No. The license was -- the
19 statute conditions the operation of the license based on
20 legislative approval and governor approval.

21 Mr. Hunsaker: And the law dictates the
22 process by which we have to follow to fulfill the
23 requirements of the license.

24 Mr. Fred Nelson: Yes.

25 Mr. Julander: Fred, if this is just a legal I, question

1 understand that it would pretty much need a vote for summary
2 judgment, but if that's the case then how could this
3 question be legitimately brought up before the board?

4 Mr. Fred Nelson: Well, you can decide the
5 legal question in favor of Jason's position.

6 Mr. Julander: And instead of voting on
7 summary judgment vote on the issue?

8 Mr. Fred Nelson: Well, that's what you are
9 doing on this. You are saying it's a legal issue and we
10 think that Jason is right in saying that the license
11 shouldn't have been conditioned on approval by the
12 legislature.

13 Ms. Nielson: If we vote no.

14 Mr. Fred Nelson: If you vote -- well, you
15 would have to make a motion to grant summary judgment to
16 Jason on this issue.

17 Mr. Julander: Even though it's a legal
18 question only.

19 Mr. Fred Nelson: Right. Your summary
20 judgment --

21 Mr. Julander: That was for my own
22 edification.

23 Mr. Fred Nelson: Summary judgment on a legal
24 issue is deciding the merits.

25 Mr. Julander: Okay. That answers it.

1 Mr. Nelson: Any more questions or comments?
2 Okay. On this item, Roman numeral number
3 seven.
4 Karen.
5 Ms. Langley: Aye.
6 Mr. Nelson: Greg.
7 Mr. Oman: I think I'll vote no on this one.
8 Mr. Nelson: Gary?
9 Mr. Edwards: Yes.
10 Mr. Nelson: Yes.
11 Dianne.
12 Ms. Nielson: Yes.
13 Mr. Nelson: Barbara.
14 Ms. Reid: Yes.
15 Mr. Nelson: Kent.
16 Mr. Bradford: Yes.
17 Mr. Nelson: Tom.
18 Mr. Chism: Yes.
19 Mr. Nelson: Rod.
20 Mr. Julander: No.
21 Mr. Nelson: Teryl.
22 Mr. Hunsaker: Yes.
23 I am going to tell your wife you didn't
24 follow the damn state law.
25 Mr. Nelson: And with that we'll move on to

1 Roman numeral number eight.

2 Mr. Holtkamp: Number eight is an argument by
3 FAIR that the issuance of the license violates the Northwest
4 Interstate Compact. FAIR argues that the B and C waste is
5 not authorized to be transferred from the Northwest Compact
6 states to Envirocare.

7 I think the fundamental point here is that
8 this is something that is completely and utterly irrelevant
9 to the validity -- or the issuance of the license. If --
10 and we don't think this is the case, but if the Northwest
11 Compact were to have determined that no B and C waste from
12 the states in the compact could come to Envirocare that has
13 absolutely nothing to do with whether or not the B and C
14 license at Envirocare as applied for was properly issued.
15 It simply means that they are not going to get waste from
16 those states. And so we think that this is -- this is an
17 issue that not only is without any factual controversy but
18 is irrelevant to the licensing proceeding and has nothing to
19 do with the validity of the license.

20 And having said that, as you can read in our
21 brief, we take issue with the notion that -- what the
22 Northwest Compact did was something other than what it did,
23 which was to allow waste streams which include this kind of
24 waste to come into the state.

25 When I get tired I start speaking quickly.

1 Mr. Nelson: Counsel for the Executive
2 Secretary.

3 Ms. Lockhart: The Executive Secretary
4 believes that the evidence that has been provided to the
5 board in the form of written minutes of the compact
6 demonstrates that the compact was approved.

7 We also agree that the issue is irrelevant to
8 whether the license should be issued; would be quite
9 relevant to the value of the license but -- that's all.

10 Mr. Nelson: Okay. Jason.

11 Mr. Groenewold: I think this is extremely
12 important because as an agreement state in the Northwest
13 Compact, Utah must have those agreements in place that they,
14 in fact, can accept this type of waste. And I think what
15 the Northwest Interstate Compact has said is, no, we are
16 only granting approval for certain types of waste streams at
17 Envirocare.

18 And if you go back and look at their
19 resolutions, they are very specific in the language that
20 they use. For example, they said large-volume, non-reactor,
21 both media from a single, slightly-contaminated site with
22 low-level radioactive waste as defined by Public Law 99-240
23 and as allowed under the radioactive materials license of
24 Envirocare of the following kinds, and they go on to
25 description some of those types of materials.

1 I think what's critical here is that when the
2 Northwest Interstate Compact granted approval for Envirocare
3 to accept certain types of waste, it was for a license and
4 it was for the conditions that were in place on the license
5 at the time that the compact voted to grant an exemption and
6 allowing Envirocare to accept certain types of waste. B and
7 C was not included in that. And, again, it would have been
8 appropriate to wait for the Northwest Interstate Compact to
9 take up this issue before granting the license because it's
10 in violation of that compact agreement to go ahead and issue
11 a license to accept waste that is being prevented by the
12 compact itself.

13 So Envirocare is arguing that they should be
14 able to take this exemption or this amended resolution order
15 that the Northwest Interstate Compact passed back in '92 and
16 clarified in '94 and then amended in '98 to say that's
17 blanket approval for any type of waste stream that we want
18 to accept or that our license may grant.

19 And, in fact, that's not what the Northwest
20 Interstate Compact has done. Yet what this license would
21 allow is for them to use that language to go ahead and start
22 accepting material as if it were. And I think what this
23 board should do is wait for those agreements to be put in
24 place from the Northwest Interstate Compact saying that,
25 yes, our amended resolution applies to B and C waste as well

1 and containerized A.

2 Ms. Lockhart: Would -- I apologize. I have
3 to make a correction. My client has just informed me that I
4 misunderstood what he previously -- what I thought he
5 previously informed me of, which was that the compact had
6 approved this and, in fact, the compact has not approved it
7 and it is their ordinary course of business not to do such
8 an approval until after the license is issued.

9 Do I have that right, Bill?

10 Mr. Sinclair: The license is not in effect,
11 therefore, the compact has nothing to act upon.

12 Mr. Hunsaker: It's just a catch 22 whatever
13 way you go.

14 Mr. Nelson: Bill. Fred. Sorry.

15 (Discussion off the record.)

16 Mr. Fred Nelson: The Northwest Compact is a
17 separate legal entity that makes determinations that are
18 independent of this board. This board does not have the
19 authority to determine for the Northwest Compact what wastes
20 can or cannot come into Envirocare as approved by the
21 Northwest Compact. So there is two separate jurisdictions
22 here; there is the Northwest Compact jurisdiction and there
23 is the board's jurisdiction. The board's jurisdiction must
24 be dealt with as state law governs. And so you look at the
25 issues as to whether or not state law has been complied with

1 with respect to the issuance of the license. Just because
2 Envirocare has a license to receive waste under state law
3 does not necessarily mean that they have received approval
4 from the Northwest Compact to receive those wastes.

5 I agree with the position that this issue is
6 properly an issue there be before the Northwest Compact and
7 is not an issue that deals with the board's jurisdiction.

8 Mr. Nelson: Dianne.

9 Ms. Nielson: Fred, could you clarify your
10 understanding that while it is properly within the
11 jurisdiction of the Northwest Compact, is it your
12 understanding that they wouldn't take action on it until
13 there were final license?

14 Mr. Fred Nelson: I am not familiar enough
15 with their procedures to be able to speak to that. I do
16 know that -- let me back up and just explain. And you may
17 know this anyway but -- but the way that the compact was
18 established was by act of Congress and the states that
19 participate passed legislation to participate in that
20 process. And there is a defined set of procedures that the
21 states use to take actions under the compact. And they do
22 that as a group, as a legal entity, in determining within
23 the compact what wastes are appropriately disposed of in
24 certain ways, and that's their legal jurisdiction.

25 Now, specifically whether they have made a

1 decision as a compact, a way to do that, I don't know, but
2 Bill has represented that that's the case, and he goes there
3 every month and I assume that that is consistent with what
4 they do.

5 It's in some ways kind of a chicken and an
6 egg thing. The state needs to act under their jurisdiction
7 and the Northwest Compact needs to act under their
8 jurisdiction. Let's assume the legislature approves the
9 license but the Northwest Compact has limited it. That
10 would be controlling because the state is a part of that and
11 would be making those decisions.

12 Mr. Nelson: Okay. Any more questions or
13 comments?

14 Mr. Julander: I am not sure curiosity is a
15 good thing at this point.

16 Assume you approved it all and the land
17 transfer was made and then the compact said no. What
18 happens to the land?

19 Mr. Fred Nelson: Well, the compact can say
20 no only with respect to the wastes within its jurisdiction
21 and with respect to arrangements, so I guess there could be
22 some very difficult issues. The compact isn't in full
23 control of Envirocare's activities because there are certain
24 kinds of waste they receive that aren't under compact
25 jurisdiction.

1 Mr. Holtkamp: It would have a limiting
2 effect on what waste could come in but, again --
3 Mr. Julander: But whether it would limit or
4 affect the land transfer would be -- we'll worry about.
5 Mr. Holtkamp: I don't think it would limit
6 the land transfer either. It just has an impact on the
7 wastes from the jurisdictions within the Northwest Compact
8 states. That's my understanding of how that works.
9 Mr. Nelson: Okay. Any more questions?
10 Karen.
11 Ms. Langley: Aye.
12 Mr. Nelson: Greg.
13 Mr. Oman: Aye.
14 Mr. Nelson: Gary.
15 Mr. Edwards: Yes.
16 Mr. Nelson: Yes.
17 Dianne.
18 Ms. Nielson: Yes.
19 Mr. Nelson: Barbara.
20 Ms. Reid: Yes.
21 Mr. Nelson: Kent.
22 Mr. Bradford: Yes.
23 Mr. Nelson: Tom.
24 Mr. Chism: Yes.
25 Mr. Nelson: Rod.

1 Mr. Julander: Yes.

2 Mr. Nelson: Teryl.

3 Mr. Hunsaker: Yes.

4 Mr. Nelson: Okay. Summary judgment is
5 granted on Roman numeral number eight.

6 Okay. Let's move to number nine.

7 Mr. Holtkamp: This issue is the thing that
8 FAIR had raised before which the board actually disposed of,
9 had to do with alleged bias and prejudice and so forth and
10 so on.

11 I think, suffice it to say, that, number one,
12 this has absolutely and completely nothing to do with the
13 issuance of the license by the Executive Secretary. This is
14 a claim that's directed to board members and so -- first of
15 all, it's got nothing to do with the Executive Secretary's
16 action. Secondly, the board considered and disposed of it a
17 couple meetings ago and we don't really see any need to
18 spend any significant time on it anymore.

19 Mr. Nelson: Okay. Counsel for the Executive
20 Secretary.

21 Ms. Lockhart: Well, the Executive Secretary
22 did not take a position on the initial motion for
23 disqualification but it seems pretty clear at this point
24 that the board has made a decision about this. It seems
25 appropriate to confirm that decision.

1 Mr. Nelson: Jason.

2 Mr. Groenewold: Well, Teryl and I are going
3 to meet later tonight.

4 Mr. Hunsaker: We'll discuss this in depth.

5 Mr. Holtkamp: In the parking lot.

6 Mr. Julander: I am going to sell seats.

7 Mr. Hunsaker: I have got to have a stool,
8 though, because he is taller than I.

9 Mr. Nelson: You will meet in the playground
10 after school.

11 Mr. Groenewold: See, I am still hoping to
12 enter into the Paralympics.

13 I think what we are going to do is let the
14 brief that we put before this board stand, as well as
15 incorporate the affidavits in our appeal about what we feel
16 was a conflict of interest and a bias that was exhibited
17 during the time when certain patterns that were related to
18 this license were conducted. And I assume that the board
19 has had a chance to read those provisions and what we
20 briefed to the board on that and we stand by that.

21 Mr. Nelson: Okay. Mr. Nelson, anything?

22 Mr. Fred Nelson: No.

23 Mr. Nelson: Okay. Questions or comments for
24 anyone?

25 Okay.

1 Ms. Nielson: I guess I do have a question
2 because of the way this is worded is a little bit different
3 than the way Mr. Holtkamp responded, so maybe I can clarify.

4 On the request for agency action -- I guess
5 that's the document I am in -- I think FAIR raised two
6 issues; one, they alleged that there was prejudice and bias
7 on behalf of the board, and that was their item 12. But
8 then in item 13 they alleged substantial prejudice because
9 of the Executive Secretary's decision on the grounds
10 indicated above, which I am assuming is on the grounds of
11 bias and prejudice. And I'm a little bit unclear because of
12 the way Envirocare has phrased its Motion for Summary
13 Judgment whether they are asking for summary judgment only
14 with respect to the prejudice and bias charges that are
15 being raised concerning the board or whether they are also
16 asking for summary judgment to the bias and prejudice
17 arguments that are raised on behalf of the Executive
18 Secretary.

19 If I could get a clarification, or if I am
20 misunderstanding this, that would be helpful.

21 Mr. Holtkamp: Dr. Nielson, it is a little
22 unclear from FAIR's pleadings as to exactly what the
23 allegations directed to, but our request for summary
24 judgment has to do with all of the allegations of bias and
25 unfairness. We don't think that -- first of all, the issue,

1 at least as to the board and a certain member of the board,
2 was, we thought, fully and completely aired and decided upon
3 a couple of board meetings ago.

4 Secondly, as with other issues, FAIR has not
5 proffered any witness or -- other than just some general
6 claims and concerns that would indicate that there was any
7 error based upon bias or prejudice on the part of the
8 Executive Secretary.

9 So the answer to your question is yes, we are
10 including all of those allegations of bias and prejudice in
11 the motion.

12 Ms. Nielson: Then I have a follow-up
13 question for Jason.

14 I think that little tete-a-tete was meant to
15 address the issue of bias prejudice regarding the board but
16 I would like to know if there are other issues or concerns
17 that FAIR wants us to be aware of at this time with respect
18 to the allegations of bias and prejudice by the Executive
19 Secretary.

20 Mr. Groenewold: No. Just simply what we had
21 in our appeal. Okay. I mean, recently we were given some
22 information but haven't had a chance to explore it and so it
23 would be premature to put any of that before the board
24 today.

25 Mr. Holtkamp: I think that would operate a

1 substantial prejudice to the parties in this proceeding if
2 they don't disclose to the parties what it is they have got.

3 Mr. Nelson: Mr. Nelson, do you have --

4 Mr. Fred Nelson: Well, it's just if they
5 don't present it there is no issue in fact.

6 Mr. Nelson: Okay. Well, I guess you are on
7 the hot seat. Anything else you want to say about it?

8 Mr. Groenewold: No. We'll hold off on that
9 particular point right now.

10 Mr. Nelson: Okay. Any questions or
11 comments?

12 All right. On the motion for dismissal of
13 Roman numeral number nine -- summary judgment, rather.

14 Karen.

15 Ms. Langley: Aye.

16 Mr. Nelson: Greg.

17 Mr. Oman: Yes.

18 Mr. Nelson: Gary.

19 Mr. Edwards: Yes.

20 Mr. Nelson: Yes.

21 Dianne.

22 Ms. Nielson: Yes.

23 Mr. Nelson: Barbara.

24 Ms. Reid: Yes.

25 Mr. Nelson: Kent.

1 Mr. Bradford: Yes.
2 Mr. Nelson: Tom.
3 Mr. Chism: Yes.
4 Mr. Nelson: Rod.
5 Mr. Julander: I am being asked to dismiss a
6 case against myself. Yes.
7 Mr. Nelson: Teryl.
8 Mr. Hunsaker: Yes.
9 Mr. Nelson: Is that a yes?
10 Mr. Hunsaker: (Nods head.)
11 All right. Well, that takes care of the nine
12 items in the Motion for Summary Judgment. One has been
13 retained, eight have been dismissed.
14 Okay, back to the agenda.
15 Mr. Fred Nelson: Mr. Chairman, can I just
16 request one thing? The normal procedure in these processes
17 is that the board issue an order and, as you'll see -- I
18 distributed some drafts that I prepared on previous issues
19 the board has ruled on. There needs to be an order prepared
20 for this matter, summary judgment motion. The typical
21 process is for the party who prevails to prepare a draft to
22 submit to the board and then I review that and comment on
23 it. And I would request that the board ask Envirocare to
24 prepare a draft supporting their summary judgment motion for
25 the board to sign. I will review that and bring it to the

1 board.

2 Mr. Nelson: Okay.

3 Mr. Holtkamp: We would be happy to do that

4 and we would, of course, provide all of the parties with the

5 drafts.

6 Mr. Nelson: Do we need to do that by motion

7 or is that just a matter of procedure?

8 Mr. Fred Nelson: Excuse me. I'm sorry.

9 Mr. Nelson: Do we need to order this by

10 motion or just as a matter of procedure?

11 Mr. Fred Nelson: Right.

12 Mr. Nelson: Okay.

13 Teryl.

14 Mr. Hunsaker: In an effort to prolong the

15 meeting.

16 Mr. Julander: You are not being paid by the

17 hour.

18 Mr. Hunsaker: As we began our meeting

19 Envirocare had 9 issues, FAIR had 15. Did we decide that

20 was illegal or legal for those two to present that and if,

21 in fact, have they presented those? I just want to make

22 sure everybody has had an opportunity to just -- I just need

23 a clarification in my mind.

24 Mr. Fred Nelson: I think where we are, at

25 this point, is if FAIR believes there are issues that they

1 raised in their pleading that were not covered by these
2 motions that they need to bring that to the board.

3 Mr. Holtkamp: That's correct. All we can do
4 is what we moved to do. That's in our motion, which we
5 think is comprehensive.

6 Mr. Nelson: Okay.

7 Mr. Groenewold: Right now, at this time, or
8 in supplemental filing?

9 Mr. Fred Nelson: I think you need to
10 identify issues that you think were not covered from your
11 pleading so that we can move forward on the process.

12 Mr. Holtkamp: This doesn't mean raising new
13 issues that were not already covered, correct?

14 Mr. Oman: As I see it, it might be number 14
15 and 15 on your initial filing. Fifteen says they reserve
16 the right to raise additional grounds for relief after the
17 prehearing record is complete. I don't know what that
18 means.

19 Mr. Holtkamp: Well, my suggestion is that if
20 FAIR has some issues that they do not believe were disposed
21 of or addressed today, that they identify those and we have
22 a chance to respond as to whether we think they were or were
23 not and then the board would make the determination as to
24 whether those go forward. All we have done is what we have
25 included in the motion.

1 Mr. Fred Nelson: We have to bring some
2 finality to the process so I would suggest that the board
3 ask FAIR to submit a pleading within 30 days that identifies
4 if there are any issues that they believe are still part of
5 their pleading and then Envirocare respond to that and then
6 the board can look at that issue.

7 Mr. Holtkamp: Our response would be whether
8 or not we think that the decisions you made today covered
9 whatever issues they may bring up.

10 Mr. Nelson: Okay.

11 Dianne.

12 Ms. Nielson: Mr. Chairman, if I could
13 clarify.

14 My understanding of the issue of 14 dealing
15 with low-level -- the low-level radioactive waste issue was
16 part of the question with the compact but I would -- I also
17 was uncertain about 15 because it sounded more procedural
18 than anything, that after a certain time that those issues
19 could be raised, but then after a certain time they
20 couldn't, so that was -- that also was my question, whether
21 procedurally the action that we have taken today had any
22 impact on 15.

23 Mr. Fred Nelson: There needs to be a --
24 you're tied to issues that you raise in the pleading. You
25 just can't keep raising issues as you go along. So there

1 needs to be a cutoff date at some point. At this point the
2 only issues that have been raised Envirocare believes have
3 been dealt with. If FAIR disagrees with that, they need to
4 provide the board information on that.

5 Ms. Lockhart: With the exception of the
6 request for amendment.

7 Mr. Fred Nelson: They could request to amend
8 their pleading and add claims. The board would have to
9 consider that.

10 Mr. Holtkamp: We would respond to that as
11 well.

12 Mr. Nelson: Okay. Oh, really?
13 Teryl.

14 Mr. Hunsaker: So I understand -- I guess
15 maybe you understand it better than I do, but the intent of
16 my question was to make sure that the 15 issues that Jason
17 brought forth were covered today. The assumption that I
18 take with some discussion that we have covered those 15
19 issues adequately. Now, I assume that.

20 Ms. Nielson: I think that was with the
21 exception of the one that we agreed should go forward.

22 Mr. Hunsaker: Yeah, that's true, you know,
23 but we -- that was my concern, that we covered all his
24 points. Whether he thinks so or not, the assumption is that
25 we have.

1 Mr. Nelson: Unless someone wants to make a
2 motion that -- like Mr. Nelson suggested -- that -- that
3 Envirocare -- that FAIR --
4 Mr. Holtkamp: We would be happy to do it for
5 FAIR.
6 Mr. Groenewold: How much would you charge?
7 Mr. Nelson: That FAIR should make a pleading
8 for any items that they feel --
9 Mr. Hunsaker: Yeah, really they still have
10 the opportunity for amendments.
11 Mr. Nelson: Okay.
12 Mr. Julander: I would so move, that any
13 issues that they have brought up that they think is beyond
14 that, that they present that as Mr. Nelson has suggested.
15 Mr. Nelson: Within 30 days.
16 Mr. Julander: (Nods head.)
17 Mr. Nelson: Okay. Do we have a second for
18 that?
19 Seconded by Greg Oman.
20 Okay. Do we need to -- okay. Let's vote.
21 All in favor say aye.
22 (Board members said aye in unison.)
23 Any opposed say no.
24 Okay. Jason, looks like you have got 30 days
25 to look over and evaluate that. Okay. And then -- oh. You

1 need an opportunity to respond.

2 Mr. Holtkamp: Ten days.

3 Mr. Nelson: Ten days.

4 Mr. Holtkamp: Ten days.

5 Mr. Nelson: Okay. Somebody want to make a

6 motion that Envirocare be given ten days to respond and then

7 it's over?

8 Ms. Langley: That portion.

9 Mr. Nelson: Yeah, that portion.

10 Ms. Nielson: Could we just clarify that this

11 would be Envirocare and the Executive Secretary?

12 Mr. Nelson: And the Executive Secretary.

13 Okay. So we have a motion.

14 Mr. Julander: Whoa. One second.

15 So this is going to take us two months. If

16 they have got 30 days. I was thinking 30 days for the whole

17 process.

18 Mr. Nelson: Well, that would allow us to

19 consider it in the next board meeting.

20 Mr. Sinclair: No, it wouldn't.

21 Mr. Julander: I would like to make the

22 motion, contrary to my last one, to give them 15 days, two

23 weeks, to present that. At that time that would give them

24 ten days and we could deal with --

25 Mr. Nelson: That's what I was --

1 Mr. Holtkamp: We would take a week in that
2 case so we could make sure it gets on the --
3 Mr. Nelson: That's what I would say, that we
4 modify so that it can be handled next time. Okay.
5 Ms. Nielson: So we need to have a second on
6 this motion?
7 Mr. Oman: Second.
8 Mr. Nelson: Okay.
9 Mr. Julander: I don't know if we need to
10 rescind the old one. I guess we automatically rescind it.
11 Mr. Nelson: With the assumption -- with the
12 understanding that this supplants the old ones.
13 Mr. Julander: Yes.
14 Mr. Nelson: All in favor say aye.
15 (Board members said aye in unison.)
16 Mr. Hunsaker: How about we adjourn?
17 Mr. Nelson: We can't do that. We have
18 action items on the agenda.
19 Mr. Hunsaker: Save them for next month.
20 Okay. My understanding is 15 days and then 7
21 days? Okay.
22 Ms. Nielson: Can I just clarify the process,
23 then, for the one issue that we agreed will go to hearing?
24 What will be the process for setting that schedule?
25 Mr. Fred Nelson: On the issue that you

1 agreed would go to hearing, the notification of further
2 proceedings asks the parties to get together and establish a
3 proposed schedule for the board and that proposed schedule
4 will be presented to the board for approval. If they cannot
5 agree to a schedule, then the board will establish a
6 schedule.

7 Mr. Holtkamp: And on Envirocare's behalf we
8 would make every effort to try and accomplish that before
9 the April meeting. I think the three of us will try and
10 come up with a proposal for the board by then.

11 Mr. Fred Nelson: You wouldn't hear the issue
12 in the April meeting but you would agree to -- approve the
13 schedule.

14 Mr. Nelson: Okay. All right.

15 Well, I was premature in trying to move on.

16 Maybe we can do that now. Okay. Roman
17 numeral five C.

18 Mr. Fred Nelson: Let me ask the board,
19 consistent with Mr. Hunsaker's comment; there are two -- two
20 issues left today to deal with the approval of the orders
21 that I prepared, which shouldn't take too long, and then
22 there is also the question of the intervention request on
23 the containerized A waste. Would -- in view of the time,
24 would the parties be interested in moving that to the first
25 part of the April meeting? I don't know that that is as

1 expedient an issue as the other one but --
2 Mr. Holtkamp: We have no objection to that.
3 Mr. Hunsaker: Okay. You don't want a motion
4 to accept it?
5 Mr. Groenewold: That's fine.
6 Mr. Hunsaker: That's the Air Force
7 reasoning.
8 Mr. Holtkamp: No, no, this is item C, the
9 intervention request and containerized A.
10 Mr. Nelson: Why don't we get an informal
11 sense from the board as to whether or not they wish to
12 continue.
13 Karen?
14 Ms. Langley: I am willing to continue.
15 Mr. Nelson: Greg.
16 Mr. Oman: I don't really care.
17 Mr. Nelson: Gary.
18 Mr. Edwards: I have got ten minutes.
19 Mr. Nelson: Ten minutes. Yeah. Okay. I
20 will stay if necessary. That's kind of noncommittal.
21 Ms. Nielson: I'm fine.
22 Mr. Bradford: I will be willing to continue.
23 I am wondering what the April agenda is looking like
24 already, how full.
25 Mr. Nelson: Not very much.

1 Mr. Holtkamp: We don't have any summary
2 judgment motions that we are aware of on the April agenda.
3 Mr. Nelson: Tom.
4 Mr. Chism: I'm fine.
5 Mr. Nelson: Rod.
6 Mr. Julander: I have at least twelve
7 minutes.
8 Mr. Nelson: Teryl.
9 Mr. Hunsaker: It's irrelevant. I have got
10 to wait for Jason anyway.
11 Mr. Nelson: Well --
12 Mr. Groenewold: I won't leave without you.
13 Ms. Nielson: I am betting on Jason.
14 Does this need to be on the record? Are we
15 still on the record with the court reporter?
16 Mr. Sinclair: Yes, we were.
17 Ms. Nielson: Do we need to be?
18 Mr. Fred Nelson: No. Only if we do the --
19 we need to be on the record only if we do the petition for
20 intervention on the containerized A waste.
21 Mr. Bradford: That's next.
22 Mr. Nelson: That's next on the agenda.
23 Mr. Fred Nelson: That would be the one you
24 would defer if you didn't want to wait.
25 Mr. Nelson: Okay. I see Bill saying, come

1 on, come on. Well, why don't we proceed.

2 Is that okay with the court reporter?

3 The Reporter: Yes.

4 Mr. Nelson: Fred.

5 Mr. Fred Nelson: This is a separate appeal
6 that was brought by FAIR. There is only one group that is
7 requesting intervention. It deals with the license
8 amendment to the existing license to consider issues related
9 to the approval of containerized A waste under that license.

10 And consistent with the way we have dealt
11 with these in the past, we should have FAIR indicate their
12 position. Because you heard the intervention rules and
13 processes in the last meeting, I don't think we need to take
14 quite as much time on this one. And then allow FAIR to
15 present their matter and then Envirocare and the Executive
16 Secretary will respond.

17 Mr. Nelson: Okay. Why don't we proceed,
18 then.

19 Mr. Groenewold: Yeah. Actually, I think
20 this one is something that can go fairly quickly based on
21 the fact that the board has taken this issue up previously
22 and already established the criteria for standing in the
23 matter of the appeal of the containerized A, class B and
24 class C waste. I think many of the same issues are before
25 this board regarding standing and we incorporate those from

1 when we would be presenting this to the board once before.

2 And kind of to review the standing
3 requirements. Generally, agency adjudication, such as the
4 one before this board, are governed by the Utah
5 Administrative Procedures Act. The act provides that the
6 presiding officer shall grant a petition for intervention if
7 they determine that the petitioner's legal rights or
8 interests may be substantially affected by the adjudicative
9 proceeding and the interest of justice and the orderly and
10 prompt conduct of the adjudicative proceedings will not be
11 materially impaired by allowing the intervention.

12 Furthermore, there has been court cases that
13 have established what some of those requirements for
14 obtaining standing are; injury to the plaintiff, that issues
15 are unlikely to be raised by others and that the issues are
16 unique and of great public importance.

17 And as the board determined in the request
18 for agency action to review the radioactive materials
19 license for containerized A, class B and C waste, it was
20 based largely on the third criterion for obtaining standing
21 which was established in National Parks and Conservation
22 Association versus the Board of State Lands. And that is
23 the plaintiff must raise issues that are so unique and of
24 such great public importance that they ought to be decided
25 in furtherance of the public interest. And the board

1 should, therefore, grant FAIR standing in the proceedings
2 for those same reasons.

3 You know, some of the concerns that we have
4 over the containerized A waste being approved for the
5 particular facility are whether or not, again, that the land
6 use exemption was properly granted by the Executive
7 Secretary when they issued their license. And I think some
8 of the issues that we raised in our request for agency
9 action are very much in the interest of the public to be
10 further evaluated and the proper way to do that is before
11 this board.

12 Mr. Nelson: Okay. Any questions?

13 Mr. Bradford: I guess I have one.

14 It seems to me -- and maybe you can enlighten
15 me -- that the issue -- the main reason you were asking for
16 standing seems like is the issue of that overriding public
17 interest and public importance, which I think seemed to
18 apply a little more when we were talking about the B and C
19 because it's a higher activity material, but the
20 containerized A waste -- they are already accepting A waste
21 and in containers it seems like the risk less than without
22 containers as they are accepting it now.

23 How do you feel about that?

24 Mr. Groenewold: I think what the
25 containerized A waste gets into is issues where it would

1 allow for nuclear waste to be accepted by Envirocare in
2 forms that currently they are not accepting, which is
3 predominantly contaminated soils. So the containerized A
4 permit -- you know, it's a different form of waste and, you
5 know, it starts to get into the issue of whether or not we
6 should allow nuclear waste to be stored in Utah. And I
7 think that is an issue that is in the public interest and
8 should be examined further by this board.

9 Mr. Nelson: Any more questions?

10 Mr. Holtkamp.

11 Mr. Holtkamp: First of all, I think that the
12 use of the term nuclear waste is not correct. We need to
13 call it what it is. It is containerized class A radioactive
14 waste. We don't want to confuse this with spent fuel rods
15 that are the subject of another and infinitely longer and
16 more contentious proceeding than this.

17 Just a couple points, actually following up
18 on Mr. Bradford's comments.

19 The board, when it granted intervention to
20 FAIR and the other groups in the B and C proceeding, did so
21 largely on the basis of the fact that the board felt that
22 there were issues of public significance, issues that
23 were -- needed to be addressed.

24 A waste has been coming in. Containerized A
25 waste has already started to come in since the issuance of

1 the license in October. FAIR has alleged in its request for
2 intervention various speculative types of harm, none of
3 which have occurred with A waste, none of which have
4 occurred since the containerized A waste comes in.

5 I would point to you the fact, for example,
6 notwithstanding claims that somehow property values would be
7 adversely affected by containerized A waste coming in, that
8 there is no evidence that that has happened since October
9 when the license was issued and the waste started to come
10 in.

11 The other concerns raised by FAIR are
12 complete speculation. There has been no evidence and
13 nothing -- FAIR has indicated nothing with regard to ground
14 water contamination, with regard to air emissions and, in
15 fact, all of these issues were addressed in the licensing
16 proceeding and in the original A license. And so we just
17 don't think that it's appropriate to grant FAIR
18 intervention.

19 We think that the most significant difference
20 between this intervention and the one that was granted in
21 the B and C waste is that there are not the same degree of
22 issues of public importance. Plus, we don't think there are
23 any substantial injuries and we think that there is actually
24 empirical evidence that there are not because this A waste
25 has been coming in, containerized A waste has been coming in

1 for the last several months. FAIR has indicated nothing
2 about how somebody's property value has been diminished
3 since the containerized A waste has been coming in or
4 anything of that nature.

5 Time is short and I'm done.

6 Ms. Lockhart: The Executive Secretary is
7 taking no position on this motion.

8 Mr. Nelson: Any words, Fred?

9 Mr. Fred Nelson: No. I believe you
10 understand the law at this point.

11 Mr. Nelson: Do we have any questions?
12 We have a petition so I don't think we need a
13 motion.

14 Any questions?

15 Okay. So are we ready?

16 Ms. Langley: Ready.

17 Mr. Julander: A vote yes --

18 Mr. Nelson: A yes would or -- a yes or aye
19 would allow -- grant standing to FAIR and no vote would deny
20 standing to FAIR.

21 Okay. Karen.

22 Ms. Langley: No.

23 Mr. Nelson: Greg.

24 Mr. Oman: No.

25 Mr. Nelson: Gary.

1 Mr. Edwards: No.
2 Mr. Nelson: No.
3 Dianne.
4 Ms. Nielson: No.
5 Mr. Nelson: Barbara.
6 Ms. Reid: No.
7 Mr. Nelson: Kent.
8 Mr. Bradford: No.
9 Mr. Nelson: Tom.
10 Mr. Chism: No.
11 Mr. Nelson: Rod.
12 Mr. Julander: Yes.
13 Mr. Nelson: Teryl.
14 Mr. Hunsaker: No.
15 Mr. Nelson: Okay. On standing, the petition
16 for standing has been denied.
17 Then we have the matter of -- the final
18 matter then of taking care of --
19 Mr. Fred Nelson: Approval.
20 Mr. Nelson: Approval of the order.
21 Mr. Fred Nelson: I think we can go off the
22 record at this point.
23 (Whereupon, the proceedings were concluded.)
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Reporter's Certificate

State of Utah)
County of Salt Lake) ss.

I, Dawn M. Davis, Certified Shorthand Reporter,
Registered Professional Reporter and Notary Public for the
State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein; that the witness was duly sworn to tell the truth, the whole truth and nothing but the truth; and that the proceedings were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof, I have subscribed my name and
affixed my seal this ____ day of _____, 2002.

Notary Public

My commission expires:
April 15, 2004

